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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1194

RAYMOND K. PROCUNIER, et al.,
Petitioners,

vs.

JOHN WESLEY CLUTCHETTE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioner, J.J. Enomoto, successor in interest as Director of the California Department of Corrections to Raymond K. Procunier, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 21, 1974.

OPINIONS BELOW

The Court of Appeals' Opinion on Rehearing was entered on October 21, 1974 and is not yet reported but is reproduced in the Appendix hereto. The opinion of the Court of Appeals entered April 25, 1974 is reported at 497 F.2d 809 and affirms the opinion of the District Court for the Northern District of California entered on June 21, 1971 which is reported at 328 F.Supp. 767.

JURISDICTION

The Court of Appeals' opinion on Rehearing was entered October 21, 1974. On January 23, 1975 petitioner's request for an extension of time within which to file this petition was granted to and including March 20, 1975. A timely suggestion for rehearing en banc was denied by the Circuit Court on February 28, 1975.

This Court's jurisdiction is envoked under Title 28, United States Code section 1254(1).

QUESTION PRESENTED

Should the Court of Appeals or the administrators of the California prisons exercise the discretion conferred by *Wolff v. McDonnell,* 418 U.S. 539 (1974) to determine the most appropriate procedure for conducting prison disciplinary proceedings?

STATUTORY PROVISION INVOLVED

California Penal Code section 5054—CONTROL OF PENAL INSTITUTIONS AND INMATES.

> The supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Director.

STATEMENT OF THE CASE

On November 20, 1970 respondents, inmates of the California state penal institution at San Quentin, filed a complaint for injunctive relief and damages in the United States District Court for the Northern District of California. A hearing on their motion for a preliminary injunction was held December 4, 1970 and on June 21, 1971 the District Court entered a declaratory judgment that the disciplinary procedures employed by petitioners at San Quentin State Prison violated the due process and equal protection clauses of the Fourteenth Amendment. Petitioners were permanently enjoined from conducting further disciplinary hearings under those procedures and ordered to submit a plan for the conduct of discliplinary hearings consistent with the opinion of the district court. *See Clutchette v. Procunier,* 328 F.Supp. 767, 784-785 (N.D. Cal. 1971).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. A panel of that Court, Judge Kilkenny concurring and dissenting,

affirmed the order of the district court and extended the scope of the ordered protections to cover disciplinary proceedings involving even the "temporary suspension of 'privileges.'" *Ciuchette v. Procunier*, 497 F.2d 809, 815 (9th Cir. 1974).

Petitioners moved for rehearing, rehearing en banc and for modification of the opinion. Rehearing was granted by the original panel but limited to the impact of this Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). Thereafter, on October 21, 1974 the panel issued an Opinion on Rehearing, Judge Kilkenny again dissenting, modifying in three particulars its earlier opinion, which it otherwise reaffirmed "because the remaining portions are in harmony with *Wolff* or are related to issues untouched by *Wolff*." *See* Appendix, p. ii. Petitioners filed a timely suggestion for rehearing en banc on November 4, 1974. Because this suggestion did not stay the issuance of the mandate [Rule 35(c), Federal Rules of Appellate Procedure] petitioners requested and were granted an extension of time to and including March 20, 1975 within which to petition this Court for a writ of certiorari. *See* Appendix, p. viii.

On February 28, 1975 petitioners' suggestion for rehearing en banc was denied by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

This Court carefully noted that its conclusion that certain procedural due process safeguards were required in prison disciplinary proceedings was not "graven in stone." *Wolff v. McDonnell,* 418 U.S. at 571-572. This Court did, nevertheless, set forth constitutionally compelled minimum requirements of procedural due process appropriate in prison disciplinary proceedings. *Wolff v. McDonnell,* 418 U.S. at 558. It then committed, within the limits set, the continuing development of procedural due process in this area to "the sound discretion of correctional officials administering the scope of such inquiries." *Wolff v. McDonnell,* 418 U.S. at 568. This Court recognized that "[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569. Petitioners respectfully submit that the procedures imposed on them as "constitutional minimums" by the Court of Appeals [*Clutchette v. Procunier,* 497 F.2d at 818] exceed the protections outlined in *Wolff* and therefore unduly circumscribe the exercise of their discretion as prison administrators for the State of California. We therefore respectfully request this Court to reverse the Court of Appeals opinion to the extent it imposes procedural protections greater than afforded by *Wolff.*

The Court of Appeals by its opinion in this case has, we submit, usurped the discretion conferred by *Wolff v. McDonnell,* 418 U.S. 539 (1974) upon the

administrators of the various prison systems in this nation to determine the most appropriate procedures for administering inmate discipline. Petitioners, the administrators of the California prison system, seek review of the Court of Appeals opinion because it has unduly constrained the discretion, recognized in *Wolff* as necessarily conferred upon them, to create appropriate procedures for conducting prison disciplinary proceedings. Under *Wolff* the federal government, the 50 states, Puerto Rico, the Virgin Islands, the Canal Zone and Guam are able, within the constraints of that opinion, to adopt procedures for administering inmate discipline in their penal institutions. The Court of Appeals decision, however, requires Washington, Oregon, Idaho, Montana, Arizona, Nevada, Hawaii, Alaska, Guam and California, which administers the largest prison population in this country, to conform to the additional restraints. If allowed to stand the Court of Appeals opinion will render these states unable to adopt procedures which prove effective upon experimentation in such states as Massachusetts, New York, Pennsylvania, South Carolina, Texas, Ohio, Wisconsin, Minnesota, and Colorado. And, the federal prisons will be compelled to employ "Ninth Circuit" rules throughout their system or adopt different rules on the basis of geography. In effect, the pool of professional experience from which new procedures can be expected to develop has been reduced by the Court of Appeals opinion from over 50 (the number of states and territories) to 10 (the number of federal circuits).

Petitioners, the administrators of the California Department of Corrections, were ordered by the district court to submit a plan for inmate discipline which they voluntarily implemented shortly after that court's opinion in *Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971). This plan, reproduced in the Appendix, was subsequently modified to conform with *Wolff v. McDonnell, supra.* It has not been accepted by the district court and has been objected to by respondents. The administrators of the California prison system seek this petition to insure their continued ability to adopt new procedures and modify existing ones as experience dictates. The question, put bluntly, is: Who is to exercise the discretion conferred by *Wolff v. McDonnell, supra?* This Court has said petitioners, the administrators of California prisons. The Court of Appeals has made serious inroads upon that discretion. Petitioners, the administrators of California's prisons ask this Court to restore this discretion to them.

ABSOLUTE RIGHT TO COUNSEL

When an inmate is required to appear before a prison disciplinary committee charged with violating a prison rule which may also be punishable as a crime by state authorities, the Court of Appeals requires that he be represented by an attorney either retained or appointed. *Clutchette v. Procunier,* 497 F.2d at 823. This holding of the Court of Appeals is purportedly based on several opinions of this Court con-

cerned with the protection of the Fifth Amendment privilege against self-incrimination, primarily *Miranda v. Arizona,* 394 U.S. 436 (1966) and *Mathis v. United States,* 391 U.S. 1 (1968). The Court of Appeals found prison disciplinary committee hearings to be "a subtle form of interrogation" [*Clutchette v. Procunier,* 497 F.2d at 823] thus requiring the giving of *Miranda* warnings.

The opinion purports to give petitioners several alternative procedures by which to comply with this holding. The Court of Appeals suggests that "adequate protection is provided by postponing disciplinary action until after criminal proceedings have been completed." *Clutchette v. Procunier,* 497 F.2d at 823. While this is the choice currently being used in the California State Prisons [*see* Director's Rule DP-4508, Appendix, pp. xx-xxi], it is not entirely satisfactory. It precludes "swift" imposition of discipline [*compare, Wolff v. McDonnell,* 418 U.S. at 563] and has led to the charge we are "relabelling some disciplinary proceedings as 'administrative classifications.'" *See Clutchette v. Procunier,* Opinion on Rehearing. Appendix, p. vi. What has resulted is that whenever petitioners seek to raise the level of custody of an inmate accused of a disciplinary infraction who is also awaiting trial in the state courts, respondents claim that the full implementation of *Miranda,* including the appointment of counsel and an adversary hearing, is required.

The other alternative suggested by the Court of Appeals in its opinion is for petitioners to guarantee

the accused inmate's right to remain silent, without that silence adversely affecting him and provide *Miranda* safeguards including the furnishing of counsel.[1] Or, the Court of Appeals suggested petitioners could require the inmate to speak in which case use immunity would flow as a necessary consequence of the compelled disclosure. *Clutchette v. Procunier,* 497 F.2d at 824 n.23.

It is this extension of the absolute right to counsel into prison disciplinary procedures, when the charged violation may also be punishable as a crime, to which petitioners object. They submit it is an unwarranted conscription of their discretion to administer prison discipline and stems from the Court of Appeals' failure to strike a reasonable accommodation between the interests of the inmates and the needs of the institutions. The Court of Appeals' opinion places petitioners "in an inflexible constitutional straight jacket" contrary to *Wolff v. McDonnell,* 418 U.S. at 563.

Petitioner, as Director of the California Department of Corrections, administers the largest prison population in this country. One of the most common

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[1]The procedure employed by petitioners in holding disciplinary proceedings prior to the district court's opinion in this case called for the inmate to be advised of his *Miranda* rights, but informed that an attorney would not be appointed to represent him because the committee would not ask him questions. Although, the inmate would be afforded an opportunity to speak if he wished, his silence, should he elect to remain silent, would not be used against him. The district court found this procedure impermissible and that finding was affirmed by the Court of Appeals. Hence, petitioners are left to conclude that the Court of Appeals requires by "*Miranda* safeguards" the admonition of constitutional rights and the furnishing of counsel. *Compare, Clutchette v. Procunier,* 497 F.2d at 824 n.23.

disciplinary offenses which occurs in our institutions is the possession of a weapon, which is also a felony offense punishable by imprisonment for a term of not less than three years. Calif. Penal Code § 4502. But, experience teaches that few criminal prosecutions are ever brought for mere possession of a weapon. However, because of the possibility of criminal prosecution the Court of Appeals opinion requires that petitioners afford the accused inmate counsel or postpone the disciplinary hearing. What purpose does counsel at such a prison disciplinary hearing serve? Formal rules of evidence which would prevail in a trial are not used in prison disciplinary cases. *See Clutchette v. Procunier,* 497 F.2d at 818 n.16; Director's Rule DP-4507, Appendix, pp. xvii-xx. There is no likelihood that substantial rights would be sacrificed if an inmate failed to raise a proper objection or to take a timely appeal. The need for legal skill in conducting these hearings is minor. *Compare, Sostre v. McGinnis,* 442 F.2d 178, 196 (2nd Cir. 1971). The sole reason advanced for requiring counsel where the accused's conduct may also be punishable as a state criminal offense is to protect the inmate's Fifth Amendment right against self-incrimination.

Petitioners respectfully submit the accused inmate's right against self-incrimination can be adequately protected by a less onerous procedure. Inmates charged with criminal conduct can be fully advised of their rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966). They can thereafter be informed that they will not be questioned by the dis-

ciplinary committee but may, if they wish, waive their Fifth Amendment right against self-incrimination, and make a statement in their own behalf. They can be further advised that the exercise of their right to remain silent will not be considered adversely to them by the committee. Petitioners would like to explore this procedure, however, the district court rejected it on the basis that the inmate's ability to present a defense at the disciplinary hearing would be unduly hampered if he exercised his right to remain silent. *See Clutchette v. Procunier,* 328 F.Supp. at 779. Petitioners respectfully submit that because of the informal nature of the disciplinary committee hearings and the due process safeguards afforded by this Court's opinion in *Wolff,* the inmate can present his defense without forfeiting his right to remain silent. Due process, particularly in prison disciplinary proceedings, should require no more.[2]

An inmate facing a possible felony prosecution as a result of an alleged infraction of an institutional rule which is also punishable as a crime is confronted with a burdensome choice. However, a potential defendant in a criminal case may be put to the admittedly difficult choice of asserting the privilege against self-incrimination in a related disciplinary proceeding or

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[2]Additionally, the district court noted that representation by counsel would assist the inmate in determining whether or not it was to his advantage to waive his Fifth Amendment right to silence. *See Clutchette v. Procunier,* 328 F.Supp. at 778 n.6. Petitioner is unaware of any case authority supporting the proposition that a person suspected of criminal conduct, after being fully advised of his *Miranda* rights, is entitled to counsel before determining whether to exercise or waive his right to remain silent.

foregoing the opportunity to make a statement in his behalf. *Compare, United States v. Kordel,* 397 U.S. 1 (1970). Neither a potential nor actual criminal defendant has a constitutional right to be relieved of the burden of this choice. In *DeVita v. Sills,* 422 F.2d 1172, 1178 (3rd Cir. 1970), the petitioner, a state judge, was awarded an injunction against pending disbarment proceedings until his criminal trial arising from the same act was completed. Relying on *Gardner v. Broderick,* 392 U.S. 273 (1968); *Spevack v. Klien,* 385 U.S. 511 (1967) and *Garrity v. New Jersey,* 385 U.S. 493 (1967), he argued that to hold the disbarment proceeding prior to criminal trial would unduly burden the exercise of his privilege against self-incrimination so as to violate the Fifth Amendment.[3] The Third Circuit reversed noting that petitioner could assert the privilege at the disbarment proceeding without being punished merely for exercising that right. *DeVita v. Sills,* 422 F.2d at 1177. Due process requires no more.

The burden imposed by this choice upon inmates charged with disciplinary infractions is neither unnecessary nor excessive, and serves the legitimate state interest of insuring "swift" discipline in penal institutions. *Compare, Wolff v. McDonnell,* 418 U.S. at 563. Since the purpose of this procedure is not to

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[3]An analysis of those cases reveals that they are inapposite to the situation presented at a prison disciplinary hearing based upon an alleged infraction of prison rules which may also be punished as a felony. In each of those cases the petitioner was punished for the mere exercise of his constitutional right to remain silent. *Compare, Gardner v. Broderick, supra,* at 274; *Spevack v. Klein, supra,* at 514 and *Garrity v. New Jersey, supra* at 496-497.

prevent the exercise of a constitutional right petitioners' believe it comports with due process and avoids the drastic remedy fashioned by the Court of Appeals. *See United States v. Jackson,* 390 U.S. 570, 581-582 (1968).

Petitioners recognize that due process requires an opportunity to present a defense. Thus, the procedures for conducting a disciplinary hearing where the charge is also a felony must provide a method by which the accused inmate who desires to remain silent can present relevant evidence in his own behalf. Such procedures are available to every accused inmate in California. The due process safeguards announced by this Court in *Wolff* afford an inmate who exercises his right to silence the opportunity to present a meaningful defense. But, where the evidence before the disciplinary committee is sufficient to support their finding that the inmate violated an institution rule, discipline may be imposed even though the inmate has exercised his Fifth Amendment right to remain silent. *Compare, Malloy v. Hogan,* 378 U.S. 1, 8 (1964). Petitioners respectfully submit that where the *Miranda* admonitions are given, an inmate can, without being afforded the assistance of counsel, be required to decide whether or not he wishes to waive his right to silence or make a statement to the disciplinary committee. If he asserts the right to silence he can present other evidence in his behalf[4] and due process is satisfied.

[4]Letters, affidavits, and other materials that would not be admissible in a criminal trial may be presented by the inmate to the disciplinary committee. *Clutchette v. Procunier,* 497 F.2d at 818 n.16.

Petitioners submit that this Court's holding in *Wolff*, that there is no right to counsel in prison disciplinary proceedings, when read against the record in that case, establishes that the mere fact the misconduct charged against the inmate is also punishable as a crime does not necessarily require the presence of counsel. The district court's opinion in *McDonnell v. Wolff*, 342 F.Supp. 616 (D. Neb. 1972) reversed, 483 F.2d 1059 (8th Cir. 1973), reversed, *Wolff v. McDonnell*, 418 U.S. 539 (1974), states that the evidence established that some of the plaintiff inmates had been disciplined for insurrection, threatening an officer's life, possession of contraband, fighting and drunkenness. The Eighth Circuit reversed and remanded to the district court to specifically determine "the circumstances in which counsel may be required." *Wolff v. McDonnell*, 483 F.2d at 1063. Thus, although discipline was imposed for acts which were criminal and the Court of Appeals recognized the possibility that some circumstances might require counsel, this Court rejected the suggestion that at this stage in the development of procedures for the conducting of prison disciplinary hearings there is a constitutionally compelled right to counsel. *Wolff v. McDonnell*, 418 U.S. at 570. Petitioners respectfully submit this Court was aware of the problems presented when inmates are accused of disciplinary infractions which may also be penal violations, yet, as a reasonable accommodation between the competing interests, found counsel not constitutionally required.

This Court's concluding discussion of procedural due process safeguards required in prison disciplinary proceedings stated:

> "It is our view, however, that the procedures we have now required in prison disciplinary proceedings presents a reasonable accommodation between the interest of the inmate and the needs of the institution." *Wolff v. McDonnell,* 418 U.S. at 572.

Following this sentence is a lengthy footnote [*Wolff v. McDonnell,* 418 U.S. 572-573 n.20] which sets forth the split of authority on "reasonable accommodation" which had occurred in the Circuits. The opinion we seek to have reviewed on certiorari is cited and discussed many times. It is cited several times as an example of an authority which has reached the same "reasonable accommodation." On other occasions it is given as an example which does not represent a reasonable accommodation between the competing interests. It is so cited for its holding that there is an unrestricted right of inmates to call witnesses and cross-examine.[5] It is, we submit, similarly cited for its discussion of the right to counsel.[6]

ABILITY TO CALL WITNESSES

This Court in discussing the accused inmate's ability to call witnesses in his defense to prison disciplinary hearings recognized that;

> "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may

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[5]This portion of the Court of Appeals' opinion was modified on rehearing. *See* Appendix, pp. iv-v.

[6]This portion of the Court of Appeals' opinion was reaffirmed on rehearing. *See* Appendix, pp. v-vi.

> create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reasons for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazard presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case." *Wolff v. McDonnell,* 418 U.S. at 566.

Yet, the Court of Appeals prevents petitioners from refusing to call witnesses requested by the inmate for any reason other than "to prevent repetitiousness." *Clutchette v. Procunier,* 497 F.2d at 818.

Petitioners do not object to giving reasons for refusing to call witnesses requested by accused inmates. Director's Rule DP-4507 provides that the reasons for not calling a witness requested by an inmate will be documented and a copy given to the inmate. *See* Appendix, p. xviii. Petitioners object to the additional limitation imposed on them as constitutionally compelled by the Court of Appeals [*Clutchette v. Procunier,* Opinion on Rehearing Appendix, p. ii] which is more restrictive than those detailed in *Wolff v. McDonnell,* 418 U.S. at 567-568.

CONFRONTATION AND CROSS-EXAMINATION

Recognizing that these rights present the greatest hazard to institutional interests and that an adequate basis for decision in prison disciplinary cases can be arrived at without cross-examination and confrontation, this Court concluded that the Constitution does not require the imposition of these procedures. *Wolff v. McDonnell,* 418 U.S. at 567-568. This Court left the resolution of whether, in any given case confrontation and cross-examination would be helpful in prison disciplinary proceedings, to the "sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569.

Initially, the Court of Appeals required, as constitutionally compelled, confrontation and cross-examination in prison disciplinary cases. *Clutchette v. Procunier,* 497 F.2d at 818-820. That portion of their opinion was modified on rehearing. *See Clutchette v. Procunier,* Opinion on Rehearing, Appendix, pp. iv-v. The Court of Appeals' Opinion on Rehearing agrees with this Court's determination that when these procedures should be imposed is committed to petitioners' sound discretion. But, that court severely circumscribed the exercise of that discretion under the guise of proscribing a "method by which the soundness of the discretion thus accorded could be subjected to scrutiny." *See Clutchette v. Procunier,* Opinion on Rehearing, Appendix, p. iv. According to the Court of Appeals only four reasons may validly support a denial of the opportunity for cross-examination and

confrontation.[7] The Court of Appeals bases its reasoning on the assumption that these were the only ills with which this Court was concerned in *Wolff*. Apart from the four reasons which the Court of Appeals believed were the only ones which would support the denial of the opportunity for confrontation and cross-examination, this Court was also concerned that imposing these procedures would mean that prison disciplinary proceedings would inevitably be longer, tend to unmanageability and give rise to substantial resentment which would hinder the rehabilitative process. *Compare, Wolff v. McDonnell,* 418 U.S. at 567, 569. Petitioners respectfully submit that the Court of Appeals' opinion has improperly encased "the disciplinary procedures in an inflexible constitutional straitjacket" contrary to the principles announced in *Wolff v. McDonnell,* 418 U.S. at 563.

A DECISION BASED ON THE EVIDENCE PRESENTED

The Court of Appeals' opinion precludes the disciplinary committee from considering information which was not presented at a hearing attended by the inmate. This holding is premised on the grounds that any other procedure would violate the inmate's right to confrontation and cross-examination. *Clutchette v. Procunier,* 497 F.2d at 820. The Court of Appeals modified its opinion in accordance with *Wolff* so that

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[7]The four reasons are: risk of reprisal; unmanageability; disruption; and safety of prison personnel. *Clutchette v. Procunier,* Opinion on Rehearing, Appendix, p. v.

confrontation and cross-examination are not required. *See Clutchette v. Procunier,* Opinion on Rehearing, Appendix, pp. iv-v. However, that court did not modify its requirement that the disciplinary committee must make its factfinding determinations based solely on evidence presented at a hearing attended by the accused inmate. Petitioners respectfully submit this requirement goes beyond constitutionally mandated minimums of procedural due process for prison disciplinary proceedings and unduly restricts their discretion.

The Nebraska regulations challenged in *Wolff* provided that the disciplinary committee could conduct additional investigation if it desired after the hearing was held and before punishment was imposed. *Wolff v. McDonnell,* 418 U.S. at 553. Implicit in this Court's discussion of the twin safeguards of "advance written notice" and "a written statement of the factfinders as to the evidence relied upon" [*Wolff v. McDonnell,* 418 U.S. at 563-564] is the principle that the accused inmate must be afforded an opportunity to reply to any evidence against him upon which the disciplinary committee may rely in reaching its decision. But, this Court recognized that the committee may receive and consider information not made available to the accused inmate.

> "It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission." *Wolff v. McDonnell,* 418 U.S. at 565.

Petitioners respectfully submit that procedural due process requires only that the accused inmate be given an opportunity to respond to any evidence adverse to him which may be considered by the disciplinary committee before reaching its decision. He can be afforded this opportunity either by appearing in person before the committee or by submitting a documentary response.

This Court in *Wolff* required the disciplinary committee to file a written statement of the evidence relied upon including the reasons for the discipline imposed. *Wolff v. McDonnell*, 418 U.S. at 564.[8] Petitioners respectfully submit that this requirement renders unnecessary the imposition of the additional procedure that the decision of the disciplinary committee be based solely on evidence presented at a hearing.

CONCLUSION

The only relief available to respondents in federal court would be an injunction enjoining the prospective enforcement of invalid prison regulations. *Wolff v. McDonnell*, 418 U.S. at 555. They are not entitled to retroactive application such as directing expungement from their prison records of previous disciplinary proceedings conducted without affording these minimum procedural due process safeguards. *Wolff v. McDonnell*, 418 U.S. at 573-574. The current rules and

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[8]This procedure was also ordered by the Court of Appeals [*Clutchette v. Procunier*, 497 F.2d at 820], and is incorporated in the petitioners' current rules for inmate discipline. *See* Director's Rule DP-4507, Appendix, p. xx.

regulations of the California Director of Corrections setting forth the procedural safeguards to be afforded in prison disciplinary hearings are reproduced in the Appendix, pp. ix through xxviii. Petitioners submit they comport with, and exceed, the minimum procedural due process safeguards required by *Wolff v. McDonnell, supra.* We therefore respectfully request this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit, reverse and remand the case with directions to dismiss.

Dated, March 18, 1975.

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(Appendix Follows)

APPENDIX

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 71-2357

John Wesley Clutchette, et al.,
Appellees,

vs.

Raymond K. Procunier, et al.,
Appellants.

[October 21, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION ON REHEARING

Before: TUTTLE,* HUFSTEDLER, and KILKENNY, Circuit Judges.

HUFSTEDLER, Circuit Judge:

We granted rehearing to assess the impact of *Wolff v. McDonnell* (1974) ..... U.S. ..... [42 U.S.L.W. 5190] upon our prior opinion stating the constitutional protections due inmates of San Quentin prison in the context of prison disciplinary proceedings (497 F.2d 809). We modify our opinion in respect of loss of privileges, confrontation and cross-examination of

*Honorable Elbert P. Tuttle, Senior Judge, Fifth Circuit, sitting by assignment.

witnesses, and the right to counsel or a counsel-substitute in disciplinary proceedings (other than those involving infractions also punishable by state authorities as crimes) to conform it to the views expressed in *Wolff*. We reaffirm our prior opinion in all other respects because the remaining portions are in harmony with *Wolff*, or are related to issues untouched by *Wolff*.

We are mindful of the Court's encouragement of the continued development of prison disciplinary procedures and of experiments within the disciplinary context directed toward rehabilitative goals. We are particularly aware of the Court's admonition that the minimum constitutional protections mandated by *Wolff* are not "graven in stone" (..... U.S. ..... [42 U.S.L.W. at 5200]) and that the underlying constitutional concepts will be subject to reevaluation as changes in prison discipline evolve.

I.

"Privileges"

Our prior opinion extended the due process protections therein described "[e]ven [to] a temporary suspension of 'privileges' by restricting the prisoner's activities to a greater extent than the general prison population . . . ." (497 F.2d at 815.) Because the Court in *Wolff* suggested that the due process procedures it commanded might not be required in proceedings involving "lesser penalties such as the loss of privileges" (..... U.S. at ..... [42 U.S.L.W. at 5200 n.19]), we reconsider the point.

Any deprivation of the small store of "privileges" accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a free setting as anyone can attest who has been a student in a strict boarding school, a sailor aboard ship, a combat soldier, or a prisoner in time of war or peace. Within prison walls, the denomination "privileges' can encompass a host of matters, ranging from simple amenities through such cherished concerns as access to visitors, schooling, recreation, and institutional employment. Grievousness of the loss depends upon the nature and extent of the privileges withdrawn for disciplinary purposes and upon the circumstances and makeup of the prisoner who suffers the loss. Deprivation of the more highly valued privileges can have as debilitating an effect on the amenability of a prisoner to rehabilitation as the loss of some good-time credit or a period of isolation from the general prison population. We therefore believe that some process is due to prisoners whose privileges are to be removed. Because the severity of the loss of privileges depends on multiple variables, we do not purport to draw a detailed constitutional blueprint governing the removal of privileges for disciplinary purposes. Process due can and should be flexible to meet the exigencies of the situation. We require only that any plan establishing disciplinary procedures attending withdrawal of privileges embrace at least these due process minima: A prisoner subject to removal of one or more privileges (1) must be given notice of intent to remove one or more stated privileges, (2) together with a statement of grounds for

removal, (3) at a reasonable time before discipline is imposed, and (4) must be given an opportunity to respond before such discipline is imposed. We leave to the prison administration the fashioning of a plan to implement these guarantees, with appropriate regard for the seriousness of the infraction, the severity of the deprivation, and the circumstances of the affected prisoner.

II.

Confrontation and Cross-Examination

Wolff held that confrontation and cross-examination are not "at the present time" constitutionally compelled. (..... U.S. at ..... [42 U.S.L.W. at 5199].) "[I]n the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska and the Federal Government, to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle." (*Id.*) The Court thereupon committed the allowance or denial of confrontation and cross-examination "to the sound discretion of the officials of state prisons." (*Id.*)

The Court did not prescribe any method by which the soundness of the discretion thus accorded could be subjected to scrutiny. We do so now. Whenever a prisoner requests and is denied the privilege of confrontation and cross-examination in a disciplinary proceeding in which a serious sanction can be imposed (excluding a proceeding for an infraction that is also a crime), the prison authorities must enter in the rec-

ord of the proceeding and make available to the prisoner an explanation for the denial. Failure to make that explanation or an explanation setting forth reasons not related to the prevention of those ills about which the Supreme Court was concerned—reprisals, unmanageability, disruption, safety of prison personnel—will be deemed prima facie evidence of abuse of discretion that can be called to the attention of parole authorities and, under appropriate circumstances, of the courts as well.

III.

Counsel and Counsel-Substitutes

In *Wolff*, the Court declined to hold "that inmates have a right to either retained or appointed counsel in disciplinary proceedings." (..... U.S. at ..... [42 U.S.L.W. at 5200].) "Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." (*Id.*)

A provision for counsel-substitute does not depend upon the seriousness of the disciplinary sanction threatened, as we had contemplated in our prior opinion, but, under *Wolff*, turns on the ability of the prisoner to handle his own case. The consideration is crucial because any guaranty of process due is empty if the particular inmate is incompetent meaningfully

to avail himself of it. Accordingly, we hold that in submitting a plan to the district court, the prison authorities must make provision for a counsel-substitute whenever a prisoner subjected to disciplinary proceedings is unable competently to handle his case without help.

Wolff did not reach the question of the right to counsel when a prisoner "is required to appear before a prison disciplinary committee for violation of a prison rule which may also be punishable by state authorities." (497 F.2d at 323.) Nothing in *Wolff* suggests to us that our reasoning or our conclusion on this issue requires reconsideration, and we decline the appellants' request that we do so.

Finally, respondents complain that the prison authorities seek to avoid the due process protections that the Supreme Court and we have required by relabeling some disciplinary proceedings as "administrative classifications." If the complaint has foundation, the ruse will be defeated. But the record before us does not reveal any facts bearing on the issue, and the district court has not had an opportunity to consider it. If any facts do exist tending to support the claim, they can be developed on remand.

We adhere to our prior opinion as herein modified. The cause is remanded for further proceedings consistent with the views herein expressed.

KILKENNY, Dissenting:

I would vacate and remand to the district court for a full fledged hearing in which the court would deter-

mine and judicially declare whether appellants' disciplinary rules and regulations, *currently in effect,* meet the four constitutional requirements enunciated in *Wolff v. McDonnell,* ..... U.S. ..... (June 26, 1974). If the court finds that the procedural due process safeguards required by *Wolff* are recognized in the current rules and regulations, the case should be dismissed. Otherwise, the court should direct appellants to amend the rules and regulations to comply with such safeguards.

Supreme Court of the United States

No. A-591

Raymond K. Procunier, et al.,
Petitioners,

vs.

John Wesley Clutchette, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 20, 1975.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of January, 1975.

STATE OF CALIFORNIA

Department of Corrections
Rules and Regulations
of the
Director of Corrections
Concerning Inmate Discipline

With revisions through January 10, 1975

PREFACE

These Rules and Regulations of the Director of Corrections for administration of the department and all of its components are issued under the authorization granted to the Director by Penal Code Section 5058. These Rules and Regulations supersede those previously in effect and are subject to change upon notice in writing. They may be modified or suspended only by the Director of Corrections.

It is not intended that these Rules and Regulations will conflict in any way with the provisions of the Constitution or laws of the United States or the State of California, or with the regulations of any agency of State Government which is entitled by law to exercise control over any of the functions of the Department of Corrections.

The contents of this book are organized to include an introduction which summarizes laws applying specifically to inmates. The first three chapters cover regulations applying to inmates, which both inmates and personnel should understand. The remaining chapters cover regulations applying to institutions and personnel.

Consistent with prior issues of the rule book, it is intended that a minimum of regulations will be provided for the guidance of both inmates and employees so that the programs of the Department of Corrections may be conducted at all times in an orderly manner in keeping with its philosophy and objectives.

The regulatory language in this book is clarified as follows: "Must", "must not", "will" and "will not" are mandatory. "May" is permissive, subject to given conditions or alternatives.

Statements of policy have been identified as such rather than as rules and precede the related rules in each article. All policy and rules are considered regulations. Procedural detail necessary to implementation of these regulations has intentionally been omitted and will be found in appropriate departmental and institutional procedure manuals. It is not expected that such procedural manuals will be of general public interest, and sufficient copies are produced to meet departmental needs only. Interested persons outside the department may review the manuals by prearrangement with my office or with the head of any departmental institution. Copies of portions of the manuals may be provided, at cost of producing the copies, at administrative convenience.

As it becomes later necessary to modify an existing regulation or add a new one, an Administrative Bulletin will be issued containing the change to be made. Suitable arrangements must be made by the institution heads, Chief, Parole and Community Services

Division and central office division chiefs to inform all employees, inmates and other concerned persons of such changes.

As approved by the Director of Corrections, the institution heads have issued such additional regulations as are required for proper operation of their institutions. These are available to inmates and employees of the individual institutions. Inquiries regarding institutional regulations should be directed to the heads of the individual institutions.

A copy of the Rules and Regulations of the Director of Corrections will be provided to all inmates and personnel of the department and to appropriate governmental agencies. Other interested persons may obtain copies at overhead cost. Please write to my office for ordering instructions.

R. K. Procunier
Director of Corrections
State Building No. 8
714 P Street
Sacramento, California 95814

July 1974

Article 5. Inmate Discipline

POLICY

DP-4501. *General.* Inmate discipline will be so administered as to maintain proper control, conserve human values and individual dignity, and to promote socially desirable changes in attitude and behavior. Each institution head will develop and implement a plan for the administration of inmate discipline, following the letter and spirit of this article. The disci-

pline of inmates is the responsibility of every employee, regardless of work assignment.

DP-4502. *Fair and Impartial Hearing Body.* Personnel involved in the incident leading to a disciplinary charge, the investigating employee, the reporting employee, and any person who has a predetermined belief that a disciplinary charge is true, must not sit as a factfinder in a disciplinary matter. A finding of guilt may be made only on the basis of a preponderance of the evidence presented at the hearing.

DP-4503. *Reporting of Rules Violations.*

1. *Minor Violations.*

   Minor acts of nonconformance to the basic rules of conduct necessary to the orderly operation of the institution may be handled, either without documentation or by recording the action on CDC Form 128a (custodial counseling chrono), and by correcting, counseling or advising the inmate regarding acceptable behavior. CDC Form 128a is to be used only for recording misconduct which has been corrected by the reporting employee and not referred to higher authority for further action. Whenever a CDC Form 128a is placed in an inmate's central file, a copy will be given to the inmate.

2. *More Serious Violations.*

   When the behavior of an inmate results in a more serious violation of the rules or of the law, it is the duty of any employee having knowledge of the

violation to report immediately the fact in writing on CDC Form 115, Rules Violation Report. The CDC Form 115 will contain a statement of the facts surrounding the charge. The inmate will be given a copy of the report and of all nonconfidential supplemental reports. No disciplinary hearing will be held until at least 24 hours after the inmate has received his or her copy of CDC Form 115, so that the inmate may prepare for the hearing.

3. The identity of the source of information upon which a disciplinary action is based may be kept confidential if disclosure would endanger the safety of the source or endanger institutional security.

Precautions must be taken to insure the reliability of any information received from an undisclosed source.

The fact of a confidential source will be documented in the information given to the inmate, and as much of the information received as can be disclosed without identifying the source will also be given to the inmate.

Any document relating information from a confidential source will also include an evaluation of the reliability of the source and a brief statement of the reasons for the conclusions reached.

No decision in a disciplinary proceeding may be based upon information from an undisclosed informant unless there is other information which corroborates that received from the source or un-

less the circumstances surrounding the event and the known reliability of the source satisfy the finder of fact that the information is true.

DP-4504. *Housing Pending Disciplinary Action.* When a CDC Form 115 report is filed, the inmate's housing status will not be changed unless additional controls are needed for the protection of staff or other inmates, or as a security measure. The ranking custodial officer on watch may order any inmate placed in segregation status if additional controls are deemed necessary, such action to be immediately reported in writing to the institution's classification committee.

DP-4505. *Disciplinary Action.* Each CDC Form 115 report must be examined by the appropriate disciplinary hearing officer as soon as possible. It will be examined by the chief disciplinary officer in the case of inmates with established release dates. Each report will be classified as Major, Serious or Administrative, according to the seriousness of the behavior reported. Once established these designations will not be changed except upon order of the chief disciplinary officer or the Warden/Superintendent.

With respect to administrative charges, the disciplinary hearing officer may dispose of the matter himself, or may delegate the responsibility to an appropriate employee with supervisorial duties. The disciplinary hearing officer will interview the inmate involved as soon as possible, but not later than 72 hours after receipt of the CDC Form 115. Additional information will be gathered if needed, and following a

thorough evaluation, one or more of the following dispositions may be made.

1. Dismissal of the matter, if the facts do not support the charge.
2. Counseling, with or without a reprimand.
3. Temporary suspension of privileges.
4. One or more weekend or holiday lockups.
5. Assignment to extra duty.
6. Confinement to quarters for a period of not more than five days.
7. Placing a hold on the inmate's trust fund when there is property damage or loss and the inmate refuses to sign a trust withdrawal slip to compensate for the damage or loss.

At any time that it appears that the matter is of a more serious nature than had been initially determined, the disciplinary hearing officer may terminate the handling of the matter and refer it to a higher level hearing.

When a CDC Form 115 is classified as a Serious charge, the matter will be heard by a senior disciplinary hearing officer, who will be designated by the institution head from among employees at the Correctional Lieutenant level or higher. When a CDC Form 115 is classified as a Major charge, the matter will be heard by either the disciplinary committee or the disciplinary subcommittee, as the institution head directs. The senior disciplinary hearing officer may refer a matter to a committee for hearing.

DP-4506. *Investigating Employees.* When a CDC Form 115 report is classified as a Major or Serious charge, the disciplinary hearing officer will inform the involved inmate of the right to the assignment of an investigating employee. Unless the inmate waives the privilege, and in all cases for an inmate with a release date, an investigating employee will be appointed by the chief disciplinary officer within 24 hours of the referral of the CDC Form 115 to a disciplinary committee or the senior disciplinary hearing officer. The inmate may not specify who will be assigned as the investigating employee. However, upon objection by the inmate to the investigating employee named, a new investigating employee may be assigned and a reasonable delay for further investigation granted. No employee will serve as investigating employee who was witness to the incident, or who is a disciplinary hearing officer or a member of the disciplinary committee which may consider the act of misconduct which is the cause of the CDC Form 115 report.

The investigating employee will interview the inmate concerned, the reporting employee and all others who may have information pertaining to the act or circumstances described in the report, and will seek information concerning both the facts of the alleged rules violation, and any mitigating circumstances. The investigating employee will have access to all available information concerning the inmate's act, and will receive cooperation from all institutional personnel, and will act as a neutral and unbiased investigator who seeks to assist the committee in its search for truth and

fairness in each matter. A copy of the investigating employee's report and any other nonconfidential supplemental reports which have been prepared in the case will be delivered to the inmate.

When an inmate with a release date is interviewed by the investigating employee, he will be informed that he has the right to request the attendance at the hearing of persons who have information relevant to the charges against him. Documentation of that advice and of the inmate's response will be made by the investigating employee.

The investigating employee will report to the committee chairman or senior disciplinary hearing officer on the relevance of information to be expected from witnesses requested by the inmate, and will also report on any security problem which would be a reason for a requested witness not to be present at the hearing.

DP-4507. *Major and Serious Charges.* The inmate must be present at the hearing concerning his conduct, unless he or she refuses to appear and use of force would be required to enforce attendance. No absentia hearing will be held when the inmate is mentally disturbed to an extent precluding meaningful participation, or when the inmate is an escapee at large.

The investigating employee must be present at the hearing unless excused by the inmate. The reporting employee or any other person whom the investigating employee or the committee chairman or senior disciplinary hearing officer believes may have pertinent information may be called to the meeting by the chair-

man or senior disciplinary officer. Questions may be asked of any person called to the meeting by the committee members, the senior disciplinary officer, the investigating employee, or, in the case of an inmate with a release date, the inmate. The committee chairman or senior disciplinary hearing officer will exercise control of all questioning to prevent lack of relevancy, harassment, abuse or repetitiveness.

When an inmate with a release date appears before the disciplinary committee or senior disciplinary hearing officer, any witnesses he or she invites to attend the hearing will normally be called to appear unless the committee chairman or senior disciplinary hearing officer finds specific reasons why one or more of them should not attend.

Reasons for not calling a witness may include, but are not limited to: danger to the safety of an informant by reason of disclosure of his or her identity, lack of relevant information or the unavailability of the witness. Institutional personnel with relevant information will be expected to attend the hearing if requested by the inmate or by the person conducting the hearing. The reasons for not calling any witness requested by the inmate will be documented, and a copy given to the inmate.

When an inmate without a release date appears before the disciplinary committee or senior disciplinary hearing officer, he or she may request the presence at the hearing of any person who will provide information favorable to his or her defense or in mitigation of the charges against him or her. Such a request may be

denied if the witness is not present in the institution, declines to appear voluntarily, is expected to provide the same information as other witnesses, has no personal knowledge of the circumstances of the offense, or if granting the request would endanger the security of the institution or be likely to result in retribution which would harm an individual. The reasons for not calling any witness requested by the inmate will be documented, and a copy given to the inmate.

Any employee who has information which relates to the charged violation or to the disposition of the charge will make that information known to the investigating employee, the senior disciplinary officer, or the disciplinary committee.

In all cases, when an inmate appears before the disciplinary committee or senior disciplinary hearing officer, he or she will be allowed to present documentary evidence in defense or mitigation of charges. Reasons for excluding documentary evidence include, but are not limited to, lack of relevance and repetitiveness. The reasons for excluding any documentary evidence will be documented and a copy given to the inmate. The committee or the senior disciplinary hearing officer may delay any decision in order to obtain further information. When the committee or senior disciplinary hearing officer is satisfied that the relevant information has been obtained, a determination must be made whether the inmate did the act which was reported on the CDC Form 115, and if it is decided that the inmate did the reported act, what disposition will be made of the matter.

The committee or senior disciplinary hearing officer must advise the inmate of the disposition of the matter at the conclusion of the hearing. A completed copy of the CDC Form 115 will be given to the inmate within three working days of the hearing. A statement by the factfinder as to the evidence relied on and the reasons for the finding reached will be recorded on CDC Form 115. The inmate will be given written information concerning the review which may be requested.

The senior disciplinary hearing officer may make any disposition of the matter which could have been made by a disciplinary hearing officer. In addition, he or she may impose one or more of the following:

1. Extended suspension of privileges.
2. Confinement in isolation status not to exceed five days.

The disciplinary committee may make any disposition of the matter which could have been made by either the disciplinary hearing officer or the senior disciplinary hearing officer, or may impose confinement in isolation status not to exceed 10 days.

Time spent in segregation pending the hearing will be credited toward any isolation sentence imposed, unless there is good cause not to grant credit.

DP-4508. *Referral to the District Attorney.* Felonies will be referred by the institution head to the district attorney for possible prosecution. The district attorney will be requested to advise the institution within five working days whether he will prosecute.

In all cases, institutional disciplinary consideration of the matter will be postponed until receipt of the district attorney's decision or the trial court's disposition of the case. The district attorney's decision or the trial court's disposition will be entered on the Form CDC 115.

When processing of a disciplinary action has been postponed pending criminal prosecution and the criminal proceedings terminate, the disciplinary process will be reactivated and carried to completion in each case. Regardless of the district attorney's or the court's disposition of the criminal charges and regardless of the disposition made by the disciplinary committee, the CDC Form 115 must reflect the finding of facts related to each act of misbehavior, including lesser acts for which criminal charges were not brought by the district attorney. Court conviction for a given act may be stated as proof that the act took place. Specific findings of fact must be made for other acts.

DP-4509. *Housing During Criminal Prosecution.* Any inmate transferred to specialized housing pending disposition of an incident referred to the district attorney will be referred immediately to the appropriate classification committee as detailed in the Classification Manual. The classification committee will determine, at its next regularly scheduled meeting, if the inmate will be returned to his regular program, admitted to a modified program or will be retained in a specialized housing unit pending final disposition by the district attorney.

In reaching its conclusion, the classification committee may consider the nature of the charges pending against the inmate in the criminal proceedings, and will assume the information stated in the report forwarded to the district attorney to be true. The classification committee should make every effort to place the inmate in as normal a program as possible under the circumstances. Continued retention in a specialized housing unit pending disposition of the charges by the district attorney is warranted only when:

a. The inmate has a record of assaultive or imminently assaultive behavior.

b. The inmate presents an escape risk of unusual seriousness or persistence.

c. The inmate has requested, or appears to require, protective custody.

d. A staff psychiatrist prescribes segregation based upon the inmate's mental condition.

e. The safety and security of the institution will be threatened if the inmate is not placed in restricted housing.

Normal classification committee procedures will be followed, except as follows:

The inmate will be advised that he does not need to appear before the committee. If he chooses to appear before the committee, he will be advised that he need make no statement and that the committee will ask no questions concerning the pending criminal charges. He will be advised that the committee is considering appropriate housing for him pending disposition of

the charges, and that he may give any information he wishes to the committee which would assist them in making that determination. He will be informed that anything he says may be used against him in court. Upon conclusion of the case, the classification committee will again review all information known to it concerning the inmate and determine appropriate placement.

*DP-4510. *Review of Disciplinary Disposition.* If an inmate is dissatisfied with the disposition of a disciplinary hearing, the inmate may request review of the matter by the chief disciplinary officer. If still dissatisfied, he or she may request review by the institution head. Either reviewing officer may confirm the decision, order further or new proceedings or modify or suspend the disposition made. If still dissatisfied, review by the Director may be requested. The inmate will be notified in writing of the right to request review.

Any person who has participated in a disciplinary process will not be used as a reviewing officer in that particular case. The institution head or his representative will assign the review to another appropriate person or refer it to the next higher level.

Any inmate request for review should be made within ten days of the action being protested. The inmate will be notified in writing of the results of any such review.

*DP-4511. *Records of Disciplinary Matters.* A copy of all documents prepared by the reporting employee,

*See revision of November 14, 1974.

the disciplinary hearing officer, the senior disciplinary hearing officer, the disciplinary subcommittee, the disciplinary committee, the chief disciplinary hearing officer, the head of the institution or the Director, with reference to any disciplinary matter will be placed in the inmate's central file.

DP-4512. *Actions Subsequent to Disposition.* Dismissal, change or reduction of a disciplinary matter reported by an employee will be discussed with the employee at the employee's request. Time of confinement in isolation may be shortened by the chief disciplinary officer if he concludes that the inmate is ready to conform to the rules and that institutional discipline will be benefitted by such an action. Upon completion of action by a disciplinary committee or the senior disciplinary hearing officer, the matter may be referred to an appropriate classification committee for consideration of whether any change in the inmate's program or custody status should be made.

DP-4513. *Length of Confinement.* No inmate will be kept in confinement in isolation status longer than ten (10) days without the approval of the Director. If at the expiration of that time, the discipline and safety of the institution requires, an inmate will be referred to the institution's classification committee for appropriate programming.

No inmate will be confined to quarters or otherwise deprived of exercise as a disciplinary measure longer than ten days, unless, in the opinion of the Warden or Superintendent, he poses such an extreme management problem or threat to the safety of other inmates and staff that longer confinement is warranted.

The approval of the Director is required in such cases.

DP-4514. *Assistance to Inmates Unable to Prepare or Present Their Positions.* When the investigating employee, the senior disciplinary hearing officer, or the disciplinary committee determines that any inmate is unable, whether for personal reasons or by reason of the complexity of the case, to collect and present the information necessary for an adequate comprehension of the case and to articulate his position, the inmate's case-worker will be assigned to consult with the investigating employee and to act on behalf of the inmate to insure that the inmate's point of view is presented at the hearing.

DP-4515. *Misconduct by Inmates with Release Dates.* When an inmate with a release date fixed at less than maximum receives a Major or Serious CDC Form 115, the Classification and Parole Representative will present the matter to an Adult Authority Member or an Adult Authority Representative to determine whether the inmate should be released as scheduled or whether the case should be placed on special proceedings calendar for review by an Adult Authority panel. When an inmate with a release date receives an Administrative level CDC Form 115 or CDC Form 128-A, custodial counseling chrono, the Classification and Parole Representative will present the report to an Adult Authority Representative for audit and review.

A. B. No. 74/55

State of California
Department of Corrections
Sacramento 95814

November 14, 1974

Administrative Bulletin No. 74/55

To: Wardens and Superintendents; Regional Administrators; Departmental Staff

Subject: Revisions in Director's Rules and Regulations

Effective immediately DP-1003—Right to Administrative Review of Grievances, DP-4510—Review of Disciplinary Disposition, and DP-4511—Records of Disciplinary Matters, of the Rules and Regulations of the Director of Corrections, July, 1974 edition, are revised as follows:

DP-1003 *Right to Administrative Review of Grievances.* Each inmate has the right to appeal decisions, conditions or *policies* affecting the inmate's welfare. Each institution head must provide a system whereby an inmate may request and receive administrative review of any problem or complaint. Such reviews will involve upper level staff and will insure that the complaint receives timely, courteous and considerate attention. The institutional appeals procedure will apply to all areas of complaint except the Adult Authority hearing process which has a special appeal or review procedure.

DP-4510 *Review of Disciplinary Dispositions.* If an inmate is dissatisfied with the disposition of a disciplinary hearing, the inmate may request

review of the matter by *submitting a CDC Form 602, Inmate/Parolee Appeal Form, to the Institutional Appeals Associate, who depending on institutional procedures, will either review the matter or refer it to the appropriate staff member for first level review. If still dissatisfied, the inmate may request review by the institution head who will either review the matter or refer it to the staff member designated as the second level reviewer.*

If the second level review is accomplished by other than the institution head, the final decision must be reviewed and approved by the institution head. If still dissatisfied, review by the Director may be requested.

At the disciplinary hearing, the inmate will be notified, in writing, of the right to request review.

Any person who has participated in a disciplinary process will not be used as a reviewing officer in that particular case. The institution head or his representative will assign the review to another staff member or refer it to the next highest level.

Any inmate request for review should be within ten days of the action being protested. The inmate will be notified in writing of the results of any such review.

DP-4511 *Records of Disciplinary Matters.* A copy of all documents prepared by the reporting employee, the disciplinary hearing officer, the senior disciplinary hearing officer, the disciplinary sub-committee, the disciplinary committee, the chief disciplinary officer, the institution head or the Director with reference to any discipli-

nary matter will be placed in the Central File, *except those adjudicated not guilty.*

All CDC Form 115's and accompanying documentation adjudicated not guilty will be placed in the appropriate stuff file per procedures outlined in Chapter IV, Section 13 of the Classification Manual.

Please take the necessary steps to insure that all employees and inmates are informed of these revisions. This bulletin will remain in effect until incorporated into the Director's Rules and Regulations.

/s/ R. K. Procunier
R. K. Procunier
Director of Corrections

APPENDIX

Supreme Court, U. S.
FILED
APR 4 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1194

J. J. ENOMOTO, et al.,
Petitioners,

VS.

JOHN WESLEY CLUTCHETTE, et al.,
Respondents.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

No. 71-2357

John Wesley Clutchette, et al.,
Plaintiffs-Appellees,
vs.
Raymond J. Procunier, et al.,
Defendants-Appellants.

[April 25, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: TUTTLE,* HUFSTEDLER, and KILKENNY, Circuit Judges

HUFSTEDLER, Circuit Judge:

Plaintiffs, who are inmates of San Quentin state prison, filed a civil rights class action challenging the constitutionality of the prison's disciplinary procedures. The district court held that the procedures violated the due process and equal protection clauses of the Fourteenth Amendment and granted the plain-

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*Fifth Circuit, sitting by designation.

tiffs declaratory,[1] injunctive, and other relief. The prison authorities have appealed.

The issues on appeal, phrased broadly, are these: (1) Did the district court lack jurisdiction either because 28 U.S.C. § 2281 compelled convening a three-judge court to consider the constitutional issues or because *Preiser v. Rodriguez* (1973) 411 U.S. 475 required the plaintiffs to exhaust state remedies before resort to the district court? (2) Do the protections of the due process clause extend to prisoners who were subjected to the challenged disciplinary procedures? (3) What process is due these prisoners in the context of San Quentin's disciplinary system?

I.

We agree with the district court that a three-judge panel did not have to be convened to hear the cause. Section 2281[2] does not apply to a suit to enjoin en-

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[1]The district court declared that "the disciplinary procedures employed at San Quentin Prison violate the due process and equal protection clauses of the 14th amendment by failing to provide for adequate notice of charges, the calling of favorable witnesses and cross-examination of accusing witnesses, counsel or counsel-substitute, a decision by a fact finder uninvolved with the alleged incident, a written finding of facts, or uniform notice of any right to appeal the decision, when such a disciplinary hearing may result in grievous loss to the prisoner[.]" (328 F. Supp. 767, 784-85.

[2]Section 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

forcement of regulations that have local, rather than "statewide application." *(Board of Regents v. New Left Education Project* (1972) 404 U.S. 541; *Moody v. Flowers* (1967) 387 U.S. 97; *Hatfield v. Bailleaux* (9th Cir. 1961) 290 F.2d 632.) The plaintiff's attack is limited to procedures conducted within the walls of San Quentin, and San Quentin's rules do not apply statewide. *(Compare Hatfield v. Bailleaux, supra* (three-judge court not required when regulation challenged applied only to single Oregon prison), *with Gilmore v. Lynch* (9th Cir. 1968) 400 F.2d 228 (three-judge court required where regulation challenged established rules for every prison in California). *See also Sands v. Wainwright* (5th Cir. 1973) ..... F.2d .....)

A more difficult question is whether the gloss of *Wilwording v. Swenson* (1971) 404 U.S. 249 by the Court in *Preiser v. Rodriguez* (1973) 411 U.S. 475 compels the plaintiffs to seek relief via habeas corpus instead of using the Civil Rights Act (42 U.S.C. § 1983). If the plaintiffs' sole recourse were to habeas, they could not maintain their federal suit because they have not exhausted state remedies.[3]

The prisoners in *Rodriguez* brought section 1983 actions seeking restoration of good time credits that had been revoked through disciplinary procedures that they claimed violated their due process and equal

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[3]The defendants do not press the point on appeal as they did below, but the jurisdictionalization of this phase of abstention requires us to consider it (28 U.S.C. § 2254(b). *See* Preiser v. Rodriguez, *supra*, 411 U.S. at 491; Fay v. Noia (1963) 372 U.S. 391, 418-40; *cf.* Wisconsin v. Constantineau (1971) 400 U.S. 433, 437.)

protection rights. The Court, stressing that relief would result in either immediate or more speedy release from confinement, held that a writ of habeas corpus was the exclusive federal remedy because the prisoners' lawsuits were "within the core of habeas corpus in attacking the very duration of their confinement itself." (411 U.S. at 487-88.) However, the Court expressly reaffirmed its earlier holding in *Wilwording* that state prisoners challenging on constitutional grounds the conditions of confinement, rather than the fact or length of custody, could properly bring section 1983 actions, thus eliminating the habeas corpus exhaustion requirement. (411 U.S. at 498-99.)[4]

The *Clutchette* plaintiffs attack neither the fact nor the duration of their confinement. No plaintiff seeks immediate or earlier release from prison. They challenge on constitutional grounds prison procedures which can result in sanctions ranging from loss of privileges enjoyed by the general prison population to prolonged isolation from other prisoners, all of which have a significant impact on the conditions of their confinement. The profile of their action thus appears to resemble *Wilwording*. However, a closer examination of the features of San Quentin's disciplinary procedures in the context of California's Indeterminate

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[4]The *Rodriguez* majority recognized the possibility that a prisoner might want to challenge both the conditions of his confinement and the fact or length of confinement. They noted that the latter claim "under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under section 1983, his claim relating to the conditions of his confinement." (411 U.S. at 499 n.14.)

Sentencing Act (Cal. Penal Code §§ 1168, 3020-25), to which these prisoners are subject, requires a reappraisal of their case under the *Rodriguez* doctrine.

The line established by *Rodriguez* between proceedings seeking earlier release from confinement and actions challenging the conditions of confinement can be applied in a good time credit system because loss of credits has a direct and specific relationship to release dates. But in California, where good time credits are non-existent, the line is blurred to the point of inapplicability because disciplinary sanctions have no fixed relationship to the fact or length of incarceration. Under California law, the Adult Authority is empowered within statutory limits to set and to reset the terms of imprisonment of adult male offenders sentenced to prison and to serve as the parole board for such offenders. (Cal. Penal Code §§ 1168, 3020, 5077.) All disciplinary actions against a prisoner are eventually reported to the Adult Authority. The Adult Authority has unfettered discretion to decide what effect, if any, a disciplinary sanction will have on the length of an inmate's confinement.[5] The Authority can and sometimes does cancel a previously set parole date or reset the inmate's sentence to a statutory maximum on the basis of even minor disciplinary actions. (*See* 2 California Bd. of Corrections, *Correctional*

[5]No published criteria guiding the exercise of the Authority's discretion have been discovered. The discretion committed to the Authority appears to be at least as broad as that conferred on a sentencing judge. *See, e.g.*, Report of the Assembly Select Comm. on the Administration of Justice, *Parole Board Reform in California* 15-16 (interim study 1970); 3 California Bd. of Corrections, *Correctional System Study: Parole Task Force Report* 115 (1971).

System Study: Prison Task Force Report 36-37 (1971). The relationship between the imposition of a disciplinary sanction and cancellation or postponement of a prisoner's release date cannot be more precisely identified. The Authority is not obliged to state reasons for its actions (*See Parole Board Reform in California, supra* note 5, at 16), and, therefore, the causal connection between a record of a disciplinary offense and an adverse response by the Authority is not always evident.

Because the potential effect of disciplinary sanctions on parole dates and length of sentence is so nebulous, we do not think that *Rodriguez* should be extended to compel the *Clutchette* plaintiffs to seek all of their relief through habeas corpus. Nor should *Rodriguez* be read to require plaintiffs to separate somehow those disciplinary proceedings that affect only the conditions of their confinement from those than can have an impact on their release dates, bringing civil rights actions challenging one type and habeas petitions challenging the other. Of course, we could verbally circumvent the problem by limiting the scope of relief available in this civil rights action to those disciplinary hearings that do not affect the length of incarceration time, leaving to prisoners, prison authorities, and state courts the task of deciding which proceedings are within or without our judgment. That course is unacceptable. Rather, we acknowledge that San Quentin's inmates cannot cast a habeas petition in *Rodriguez'* mold because it would be exceedingly rare, if ever, that a prisoner could aver that he would have been entitled to immediate release or release on a date

certain had he not been subjected to the disciplinary procedures that he attacks on constitutional grounds. We hold that the speculative and incidental effort of prison disciplinary procedures on the duration of plaintiffs' sentences is not sufficient to bring any part of this action within the "core" of habeas corpus. Therefore, it was proper for the district court to permit plaintiffs to proceed with their civil action under 1983 without their having exhausted state remedies.[6]

II.

The plaintiffs retained a residuum of constitutionally protected liberty after they were convicted and incarcerated. Serious inroads on that liberty can be made only by following due process requirements. (*Cf. Gagnon v. Scarpelli* (1973) 411 U.S. 778; *Morrissey v. Brewer* (1972) 408 U.S. 471.) Accordingly, our circuit and others have held that those prison disciplinary proceedings that can result in the imposition of "significant" sanctions upon prisoners must be conducted with due process safeguards. (*Allen v. Nelson* (9th Cir. 1973) 484 F.2d 960, *aff'g* (N.D. Cal.) 354 F. Supp. 505; *McDonnell v. Wolff* (8th Cir. 1973) 483

[6]We agree with the district court that the traditional doctrine of abstention is inapplicable to the case at bench. Plaintiffs challenge the constitutionality of the disciplinary procedures utilized at San Quentin. There is no state law issue that can dispose of the case without the necessity of reaching the federal constitutional questions raised. (*Compare* Railroad Comm'n v. Pullman Co. (1941) 312 U.S. 496.) There is no question as to the meaning or scope of the disciplinary procedures challenged. Thus, there is no saving construction of the procedures that can be made to avoid their constitutional infirmity. (*See, e.g.,* Chicago v. Atchison, T. & S.F. Ry. (1958) 357 U.S. 77.) Finally, because there is no impending or ongoing state prosecution or civil action, abstention based on the notions of federalism central to Younger v. Harris (1971) 401 U.S. 37 is not appropriate.

F.2d 1059, *cert. granted* (Jan. 22, 1974) 42 U.S.L.W. 3422 (No. 73-679; *United States ex rel. Miller v. Twomey* (7th Cir. 1973) 479 F.2d 701; *Gray v. Creamer* (3d Cir. 1972) 465 F.2d 179; *Sostre v. McGinnis* (2d Cir. 1971) 442 F.2d 178; *see Palmigiano v. Baxter* (1st Cir. 1973) 487 F.2d 1280.)

When the district court decided this case, it had little guidance in drawing a due process line other than the general principle, derived from Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath* (1951) 341 U.S. 123, that procedural due process protections are due state prisoners subjected to disciplinary proceedings if, as a result of such proceedings, they will be "condemned to suffer grievous loss." (*Id.* at 168, *quoted in Goldberg v. Kelly* (1970) 397 U.S. 254, 263, and in *Morrissey v. Brewer, supra,* 408 U.S. at 481.) In applying the "grievous loss" concept, the district court recited instances in which deprivations were serious enough to require application of due process[7] and implied that other, less significant disciplinary restrictions of a prisoner's liberty or property interests might not warrant procedural protections. Other courts have made comparable efforts at defining, at least in part, those sanctions which constitute "serious deprivations" or "grievous loss" so as to outweigh

[7]The district court held that "grievous loss" included a possible increase in a prisoner's sentence by reason of referral of the disciplinary action to the Adult Authority, fine or forfeiture of accummulated earnings, isolation confinement for more than 10 days, indefinite confinement in the adjustment center or segregation, and referral to the district attorney for criminal prosecution. (328 F. Supp. at 785.)

any governmental interest in summary adjudication. (*See, e.g., United States ex rel. Miller v. Twomey, supra; Sands v. Wainwright* (M.D. Fla. 1973) 357 F. Supp. 1062, *vacated*, ... F.2d .....; *Bundy v. Cannon* (D. Md. 1971) 328 F. Supp. 165.)

The attempts thus to classify disciplinary sanctions that adversely change a prisoner's status are predicated on an erroneous notion of due process. The "schedules" developed, of course, have great relevance to an evaluation of the "weight" of the prisoner's interests affected by the imposition of disciplinary sanctions. And the relative weight of liberty or property interest has a significant impact on any determination of the formality and procedural requisites of the hearing required in particular circumstances by due process. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 570; *Fuentes v. Shevin* (1972) 407 U.S. 67, 90 n.21.) "But to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." (*Board of Regents v. Roth, supra* at 570-571, *citing Morrissey v. Brewer, supra.*)[8] That is, we must see if the prisoner's interest affected is within the Fourteenth Amendment's protection of liberty and property (*see id.* at 571); for any prison disciplinary proceeding that impairs a prisoner's residuum of liberty or adversely affects his property interest (and which is not de minimis) condemns a prisoner "to suffer grievous loss," as that term is now understood.

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[8]It is clear, however, that the weight cannot be so slight that the interest may be characterized as de minimis. (Fuentes v. Shevin, *supra*, at 90 n. 21.)

It is difficult to imagine any sanction that might be imposed by a prison disciplinary committee which would not constitute a further impairment of a prisoner's already restricted interest in liberty[9] (or in the case of a fine or a forfeiture of accumulated earnings, which would not constitute a deprivation of a property interest). All the sanctions considered by the district court to constitute "grievous loss" *(see* note 7 *supra)* involve an impairment of a prisoner's surviving interests in liberty and property. Any entry in a prisoner's permanent file which indicates that he has been found guilty of a violation of prison regulations, whether or not the file is forwarded immediately to the Adult Authority, has an incalculable effect on a prisoner's eligibility for parole (*see, e.g., McDonnell v. Wolff, supra,* 483 F.2d at 1064 & n.7; *Hudson v. Hardy* (D.C. Cir. 1970) 424 F.2d 854, 856), an effect which without question impairs a prisoner's interest in "liberty." Finally, even a temporary suspension of "privileges," by restricting the prisoner's activities to a greater extent than the general prison population, constitutes an abridgment of the prisoner's limited residuum of liberty. (*See Palmigiano v. Baxter, supra,* 487 F.2d at 1284; *cf. Jackson v. Godwin* (5th Cir. 1968) 400 F.2d 529, 535.) Indeed, "the distinction between a 'right' and a 'privilege'—or between 'liberty' and a 'privilege' for that matter—is nowhere more meaningless than behind prison walls." (*Sostre v. McGinnis, supra,* 442 F.2d at 196 (footnote omitted).)

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[9]The Supreme Court, in another procedural due process context, observed generally that "the meaning of 'liberty' must be broad indeed." (Board of Regents v. Roth, *supra* at 572.)

III.

Under the disciplinary procedures existing at the time of commencement of this lawsuit, an accused inmate was visited by a hearing officer within 24 hours of an alleged infraction. The officer orally informed the prisoner of the charges against him. The officer could impose sanctions for minor infractions without any further investigation or hearing, but serious offenses were referred to a disciplinary committee. At the committee hearing, the complaint and, in some cases, a summary of supplemental reports were read to the inmate (but not shown to him), and he was then given an opportunity to explain his conduct. The decision of the committee was recorded and forwarded to an associate warden for approval.

The district court agreed with the plaintiffs' contention that these procedures did not satisfy the minimum due process standards applicable to prison disciplinary proceedings. In addition to granting declaratory relief,[10] the court enjoined defendants from conducting any further disciplinary proceedings at San Quentin so long as the procedures employed remained constitutionally infirm and ordered the defendants to submit a plan for the conduct of disciplinary proceedings consistent with the court's opinion.[11] The district court also ordered that the decisions of the disciplinary committee in the hearings of the named

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[10] *Supra* note 1.

[11] This order was stayed pending appeal, but a plan was ordered to be submitted to the district court. The plan was not made a part of the record on appeal, but it is described in *Judicial Interventions in Corrections: The California Experience—An Empirical Study*, 20 U.C.L.A. L. Rev. 452, 539-41 (1973).

plaintiffs be set aside, that the plaintiffs be returned to their pre-disciplinary hearing status, and that the decisions of the disciplinary committee be expunged from the named plaintiffs' records and not be referred to the Adult Authority.

It is now axiomatic that the requisites of due process vary according to specific factual contexts. (*E.g., Morrissey v. Brewer, supra,* 408 U.S. at 481; *Goldberg v. Kelly, supra,* 397 U.S. at 262-63.) Fashioning the due process formula for each situation requires striking an appropriate balance by identifying and assessing the relative weights of the competing individual and state interests involved. (*Cafeteria & Restaurant Workers v. McElroy* (1961) 367 U.S. 886, 895; *see Hannah v. Larche* (1960) 363 U.S. 420, 442.)

Every San Quentin disciplinary hearing threatens a prisoner's small store of protected liberty and potentially his property as well. The severity of the sanction that may be imposed varies and, accordingly, the kind of process due will vary, at least in detail.

The state's interests in prison disciplinary procedures administered in San Quentin are multiple and also of varying importance. They range from its interest in rehabilitation of the offender, the primary goal of a corrections system which ultimately returns almost all offenders to society,[12] through prison security and "efficient custody" to considerations of economy in using scarce public financial resources.

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[12]It has been estimated that 99 percent of those persons sentenced to confinement will one day return to free society. (National Advisory Comm. on Crim. Justice Stds. & Goals, *Corrections* 20 (1973) [hereafter cited *Corrections*].)

The least weighty of these interests in the procedural due process scale is thrift. The need for conservation of public financial resources is real.[13] However, the interest in savings that can be realized from depriving prisoners of minimum procedural safeguards designed to enhance fair fact finding is outweighed by the larger public interest in rehabilitating offenders and by the individual prisoner's interest in clinging to the remnants of his liberty. The Supreme Court has recognized the linkage between the rehabilitative goals of corrections and the conduct of correctional hearings utilizing nonsummary procedures which are fair and which appear fair to the offender. *(See, e.g., Morrissey v. Brewer, supra,* 408 U.S. at 484; *In re Gault* (1967) 387 U.S. 1, 26; Millemann, *Prison Disciplinary Hearings and Procedural Due Process: The Requirement of a Full Administrative Hearing,* 31 Md. L. Rev. 27, 42-44 (1971).) It has also held that an individual's interest in an adequate hearing cannot be sacrificed to the state's interests in saving time and money: "Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions [or liberties] are about to be taken." *(Fuentes v. Shevin, supra,* 407 U.S. at 90 n.22; *accord, Goldberg v. Kelly, supra,* 397

[13] "[T]here are serious practical problems with introducing too many legal controls into the correctional process. Their cost in money and in the time of already overburdened defense counsel and correctional personnel would be great. Given scarce resources throughout the criminal justice system, it is obvious that some priorities must be established." (President's Comm'n on Law Enforcement & Administration of Justice, *Task Force Report: Corrections* 84 (1967).)

U.S. at 265-66).[14] The undeniable fact that the imposition of due process minimums will increase the cost of maintaining San Quentin is not a basis for rejecting plaintiffs' due process claims.

Prison security and "efficient custody" of the inmates *(Palmigiano v. Baxter, supra,* 487 F.2d at 1285) are interests that must be accommodated. Without them, San Quentin could not be administered at all. The key word, however, is "accommodation," not "sacrifice." In emergency situations in which there is grave risk of physical harm to prison personnel or to inmates from outbreaks of individual violence or riots, immediate action can be taken. But, as the district court observed (328 F. Supp. at 782 n.13), the state's interest in achieving security through summary procedures is adequately vindicated by permitting prison officials temporarily to isolate potentially disruptive inmates.[15] *(Biagiarelli v. Sielaff* (3d Cir. 1973) 483

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[14]*See also* Stanley v. Illinois (1972) 405 U.S. 645, 656; "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

[15]While emergency isolation need not be based on information which would be sufficient to warrant a finding by a disciplinary committee that the prisoner had engaged in conduct which threatened other prisoners or the prison, such action must at least be predicated on a good-faith determination that immediate action is necessary (*see* United States *ex rel.* Miller v. Twomey, *supra,* 479 F.2d at 717); and the isolation must be accomplished in the manner that, consistent with the maintenance of order in the prison, is least restrictive of the prisoner's rights and privileges. (*Cf.* Palmigiano v. Baxter, *supra.*)

F.2d 508; *cf. North America Cold Storage Co. v. Chicago* (1908) 211 U.S. 306.) Once the imminent threat of violence has passed, of course, the prison authorities have no cognizable interest in maintaining the suspected troublemakers in isolation status—or in imposing any other disciplinary sanctions—without first providing an appropriate hearing.

As we have earlier pointed out, the rehabilitative goal is improved, not impaired, by imposing procedural protections designed to thwart arbitrariness and to enhance the quality of fact finding. A prisoner who receives what he reasonably views as unfair or arbitrary treatment from prison authorities is likely to become a difficult subject for reformation or even for efficient custody. *(E.g., United States ex rel. Miller v. Twomey, supra,* 470 F.2d at 715; *Task Force Report: Corrections,* supra at 83.)

We conclude that, except in emergency situations, the inmate's interest in preserving his slight liberty and his property and the public interest in reaching the rehabilitative ends of corrections outweigh any competing interests that could be promoted by preserving summary proceedings in the conduct of San Quentin's disciplinary hearings.

IV.

We turn to the task of defining specifically the minimal procedural safeguards that must be accorded to San Quentin's inmates in all prison disciplinary proceedings. In doing so, we emphasize at the outset that we agree with the district court's conclusion that our

judicial role is properly limited to prescribing the constitutional minimums and requiring the San Quentin administrators to produce a plan which the district court can test against the basic constitutional criteria.

1. Notice—The defendants concede that an essential element in any system of minimum procedural safeguards is providing the accused inmate with specific notice of the charges against him. Adequate notice has been held by our circuit to be an indispensible ingredient of minimum due process in the prison context (*Allen v. Nelson, supra*), and it has been unanimously viewed as a necessary safeguard in prison disciplinary proceedings. (*See, e.g., McDonnell v. Wolff, supra,* 483 F.2d at 1962-63; *United States ex rel. Miller v. Twomey, supra,* 479 F.2d at 716, 718; Corrections at 51.) The notice must inform the inmate of the charges against him and of the details of his alleged offense (*Morrissey v. Brewer, supra,* 408 U.S. at 489); it must be promptly delivered to him and must be received sufficiently in advance of the hearing to enable him to prepare any defense he may have. (*McDonnell v. Wolff, supra* at 1062; *see In re Gault, supra,* 387 U.S. at 33.) Moreover, to permit presentation of an effective defense and to facilitate the therapeutic value of a fair and impartial disciplinary hearing, the prisoner should also receive a written explanation of the procedures that will be employed at the disciplinary proceeding and a statement of his rights (and the limitation of those rights) under the hearing rules.

2. The Right To Be Heard and To Present Witnesses—The fundamental guaranty of due process is the opportunity to be heard. Prior to the imposition of disciplinary sanctions, an accused inmate must have an opportunity to show, if he can, that he did not violate the rule as charged or to explain that, although guilty of the charged infraction, there are mitigating circumstances. *(Sostre v. McGinnis, supra,* 442 F.2d at 198-99, 203; *see Morrissey v. Brewer, supra,* 408 U.S. at 489; American Correctional Assoc., *Manual of Correctional Standards* 409-10 (3d ed. 1996).)

He also has a right to present witnesses and documentary evidence to support his contentions. *(McDonnell v. Wolff, supra* at 1062-63; *see Morrissey v. Brewer, supra* at 489; *Corrections* at 52.[16] The ability to produce evidence other than his own testimony is necessary to assure that he will be heard "in a meaningful manner." *(Armstrong v. Manzo* (1965) 380 U.S. 545, 552.) Without such a right, relevant exculpatory evidence, not within the personal knowledge of the accused but nonetheless essential to a fair and accurate fact finding determination, may not be heard at all; relevant corroborative testimony and real evidence, frequently important for the defense of a possibly unreliable prisoner, may also be presented for the same purpose. The initial decision concerning the witnesses to be called in his defense should be made

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[16]The procedural rules utilized at the hearing should be flexible, so that it is possible to consider letters, affidavits, and other material that would not be admissible in an adversary, criminal trial. (*See,* Morrissey v. Brewer, *supra* at 489.)

by the accused. However, the disciplinary committee has the power to limit the number of witnesses called to prevent repetitiousness and to control the admission of documentary evidence to avoid irrelevant or merely cumulative evidence.

3. The Right to Confrontation and Cross-Examination—Confrontation and cross-examination of witnesses at a hearing help guarantee that the fact finding process is as complete and reliable as possible. Accordingly, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." (*Goldberg v. Kelly, supra,* 397 U.S. at 269.) Prison disciplinary hearings, no less than parole revocation proceedings (*Morrissey v. Brewer, supra* at 489), involve factual determinations and thus must provide an opportunity for an accused inmate to demonstrate that the evidence against him is based on misperceptions or on faulty memories or that it is motivated by malice or prejudice. (*McDonnell v. Wolff, supra* at 1062-63; *Palmigiano v. Baxter, supra,* 487 F.2d at 1290; *cf. Greene v. McElroy* (1959) 360 U.S. 474, 496-97. *But see Sostre v. McGinnis, supra,* 442 F.2d at 196-97.)[17]

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[17]Neither the right to confront and cross-examine adverse witnesses nor the correlative right to a decision based on the evidence (*see infra*) precludes, where appropriate, the use in prison disciplinary hearings of conventional substitutes for live testimony. (*See* Gagnon v. Scarpelli, *supra,* 411 U.S. at 782-83 n.5; *compare* note 16 *supra.*) Indeed, even in criminal trials, common law exceptions to the hearsay rule permit some evidence to be admitted without being tested by cross-examination. (*E.g.,* Dutton v. Evans (1970) 400 U.S. 74; California v. Green (1970) 399 U.S. 149.)

Similarly, the right to confront and cross-examine means only that there must be an adequate opportunity to rebut the evidence

Permitting an inmate to confront and cross-examine his accusers may threaten an erosion of traditional inmate-staff relationships. (Millemann, *Prison Disciplinary Hearings and Procedural Due Process, supra* at 53.) But this concern, based on a desire to isolate prisoners from the correctional staff and to shield the conduct of the latter from scrutiny and criticism, is premised on notions of authority that have recently been questioned. *(See, e.g., Corrections* at 485-86.) More importantly, to the extent that accommodating this interest is inconsistent with implementation of procedural protections necessary to insure fundamental fairness in those proceedings which threaten prisoners with the deprivation of constitutionally protected interests—such as the right to confrontation and cross-examination of adverse witnesses—the concern for administrative dislocation must yield. *(See Fuentes v. Shevin, supra,* 407 U.S. at 90 n.22.)

It is also true that identification of inmates testifying against the accused prisoner, obviously a necessary aspect of confrontation and cross-examination, may lead to reprisals against those testifying. *(See generally* American Correctional Assoc., *Manual of Corrections, supra* at 410.) But this concern for the safety of inmates does not justify a wholesale denial of the right to confront and cross-examine adverse

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by facing the Government's witnesses. (Goldberg v. Kelly, *supra,* 397 U.S. at 269, 270.) Thus, there is no constitutional barrier to the use by prison authorities of written reports to support their charges against an accused inmate, provided that the inmate is given a meaningful opportunity to call the authors of the reports as witnesses and subject them to cross-examination. (Palmigiano v. Baxter, *supra* at 1290; *see* Richardson v. Perales (1971) 402 U.S. 389, 407.)

witnesses. Rather, prison authorities must attempt to provide protection for testifying inmates in a manner which creates the least interference with the right of an accused prisoner to a fair and reliable disciplinary hearing. (*See Palmigiano v. Baxter, supra* at 1287-88. *See generally Shelton v. Tucker* (1960) 364 U.S. 479; *Dean Milk Co. v. City of Madison* (1951) 340 U.S. 349.) When an actual, legitimate fear of retributive violence exists and usual methods of protecting the testifying inmate (*e.g.*, temporary, protective segregation consented to by the inmate) are inadequate, however, a modification of the usual procedure of confrontation and cross-examination may be justified. But the exact procedures to be used under those circumstances for revealing to the accused inmate the substance of the adverse witness' testimony to permit him to rebut the evidence and for providing the disciplinary committee with an opportunity to probe in camera the credibility of the witness should be, in the first instance, worked out by the prison authorities subject to the approval of the district court. (*See Palmigiano v. Baxter, supra* at 1290; *cf. Gagnon v. Scarpelli, supra,* 411 U.S. at 778, 782-83 n.5.)

4. A "Neutral and Detached" Hearing Body— Basic to an accused prisoner's constitutional guarantee of an accurate and fair fact finding determination prior to imposition of sanctions is the right to be heard by an impartial disciplinary committee. (*Morrissey v. Brewer, supra* at 489; *Goldberg v. Kelly, supra* at 271; *see Corrections, supra* at 52.) "[P]ersonal knowledge of, and sometimes bias toward, the

inmate defendant, tendency to support staff, and reaction to inmate attitude toward the [disciplinary committee]" may affect the decisions of any prison administrator or staff member sitting on a disciplinary committee. *(See* Harvard Center for Crim. Justice, *Judicial Intervention in Prison Discipline,* 63 J. Crim. L. 200, 210 (1972).) And it is likely that most prison officials will have some awareness of at least the more significant disciplinary problems which have arisen within the institution. Nevertheless, provided that no member of the disciplinary committee has participated or will participate in the case as an investigating or reviewing officer, or either is a witness or has personal knowledge of material facts related to the involvement of the accused inmate in the specific alleged infraction (or is otherwise personally interested in the outcome of the disciplinary proceeding), a hearing board comprised of prison officials will satisfy the due process requirement of a "'neutral and detached' hearing body." *(See, e.g., Morrissey v. Brewer, supra* at 489; *Meyers v. Alldredge* (3d Cir. Feb. 14, 1974) (No. 72-1819) (slip sheet at 15-17); *Landman v. Royster* (E.D. Va. 1971) 333 F. Supp. 621, 653.)

5. A Decision Based on the Evidence Presented— Use of information not presented at the hearing leaves the inmate without any means of rebutting or seeking to mitigate the evidence against him. *(See United States v. Abilene & S. Ry.* (1924) 265 U.S. 274, 289.) For the right to confront and cross-examine adverse witnesses to be meaningful, the disciplinary committee

must be required to make its fact finding determinations based solely upon the evidence presented at the hearing. (*See Goldberg v. Kelly, supra* at 271; *Corrections, supra* at 52.) To insure compliance with this requirement, the committee must state briefly the reasons for its decision and indicate the evidence on which it relied. (*Morrissey v. Brewer, supra* at 489; *Goldberg v. Kelly, supra* at 271.)

As we have already indicated, utilization of these procedural safeguards is necessary for any prison disciplinary proceeding to be consistent with the requirements of the due process clause of the Fourteenth Amendment, regardless of the sanction that is imposed.[18] Because the procedures challenged in this case did not meet these minimums, they are unconstitutional.

V.

Utilization of the minimum procedural protections heretofore outlined will not be sufficient to satisfy the requirements of the due process clause in all prison disciplinary proceedings. As we have noted several times, the severity of the sanction imposed by a disciplinary committee may vary over a wide range. When the consequences of disciplinary action are most serious, for example, when the inmate is subject to pro-

[18]Nothing we have said concerning the minimum necessary procedural protections should be construed as limiting the safeguards which prison officials may provide. Of course, to the extent that additional safeguards are utilized, they must be made available to all inmates subject to the same class of disciplinary sanction unless there is a rational basis for differentiating between the inmates. Failure to provide such even-handed treatment, as the district court recognized (328 F. Supp. at 784), violates the equal protection clause of the Fourteenth Amendment.

longed periods of "isolation,"[19] the balance between the accused prisoner's interest in procedural protections which assure a fair hearing and the state's interest in limiting the safeguards is altered, and more "process is due." (*See Morrissey v. Brewer, supra* at 481. *See also Boddie v. Connecticut* (1971) 401 U.S. 371, 378.) Thus, while not constitutionally required in every proceeding, in many cases prison officials must provide an accused inmate with either counsel or counsel-substitute. (*See Corrections, supra* at 52; *Task Force Report: Corrections, supra* at 86. *See generally Gagnon v. Scarpelli, supra,* 411 U.S. at 783-91.)

The Supreme Court has long recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (*Powell v. Alabama* (1932) 287 U.S. 45, 68-69.) The need for assistance to permit adequate presentation of a defense is particularly strong in the context of prison disciplinary proceedings because "penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." (*Johnson v. Avery* (1969) 393 U.S. 483, 487 (footnote omitted).) Indeed, in large part because of the lack of

[19] As described by the district court, isolation involves spending at least 23 hours per day in a cell, which may be a regular 5 feet by 9 feet concrete cell with cot, sink, and toilet or a "strip" cell with a solid door, a mat in place of the usual cot, and a hole in the floor instead of regulation plumbing. The prisoners in isolation eat meals alone and have only vocal contact with other prisoners who may be in isolation except during the brief exercise period. A special restricted diet may be imposed by the disciplinary committee. (328 F. Supp. at 775-77.)

education of parolees and probationers (most of whom are former prisoners), the Supreme Court last term held that the state's interest in informality, flexibility, and economy in parole/probation revocation hearings, in most cases, must yield to an accused probationer's need for appointed counsel whenever the probationer has a colorable claim that he has not committed the alleged infraction. (*Gagnon v. Scarpelli, supra* at 786, 790).[20]

In the context of prison disciplinary hearings, as in the parole/probation revocation context, the question of a right to counsel involves a conflict between a prisoner's interest in avoiding unwarranted restrictions of his liberty and the state's competing interest in efficient and informal hearing procedures. The defendants have suggested no additional state interest, not present in parole revocation hearings, which, under the principles enunciated in *Gagnon v. Scarpelli,* justifies denial of legal assistance to an inmate who wishes to assert a factual or defense or to present mitigating circumstances. However, in *Johnson v. Avery, supra,* the Supreme Court held that in some instances the assistance of fellow inmates is an acceptable substitute for the assistance of counsel or "paraprofessionals," such as law students. (393 U.S. at 490.) Thus, we cannot formulate a per se rule that whenever assistance is required in prison disciplinary

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[20]The Court also held that, presumptively, a probationer has a right to appointed counsel if he has a colorable claim that, despite having committed the infraction, there are "substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." (*Id.*)

proceedings, it must be provided by a qualified member of the bar. *(See Palmigiano v. Baxter, supra* at 1290-92.)[21]

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[21]In *Palmigiano* the First Circuit rejected the contention that due process requires that the state furnish counsel in all prison disciplinary hearings, noting that the rules in force in Rhode Island prisons provide for the assistance of counsel-substitute (a classification counselor or other individual specifically approved by the prison administration) if the accused inmate requests help in the presentation of his case. (487 F.2d at 1290). On the other hand, the court did hold that an inmate should be permitted to bring retained counsel with him into the disciplinary hearing. (*Id.* at 1291-92.) Counsel's role in the hearing, however, was limited to "consultation"; specifically, the court provided that counsel could not participate in cross-examination. (*Id.* at n.27.)

It is not necessary for us now to reach the question whether there is a constitutional right to retained counsel which is broader than the due process right to appointed counsel. Consideration of this question, as well as many others relating to the proper scope and implementation of a right to counsel or counsel-substitute, should be left in the first instance to prison authorities under the supervision of the district court. (We note, for example, that the First Circuit's decision was, to a certain extent, grounded in the fact that existing prison rules permitted intermittant consultation with retained counsel outside the hearing room while the hearing was in progress. The propriety of any such rule is properly first evaluated by the responsible prison administrators.)

We do observe, however, that a serious equal protection question would be raised by any procedure which denied the assistance of counsel to indigent inmates faced with a prison disciplinary hearing but permitted such assistance for wealthy inmates. To be sure, this problem may be mitigated by the provision of counsel-substitute to indigent inmates. Moreover, it has been suggested that a case-by-case evaluation of whether counsel is required, as mandated by *Gagnon v. Scarpelli,* would avoid any equal protection problems with permitting retained counsel to appear. (*E.g.,* Argersinger v. Hamlin (1972) 407 U.S. 25, 63 n.31 (Powell, J., concurring).) But in *Gagnon v. Scarpelli* the Supreme Court considered only a probationer's *due process* right to appointed counsel, expressly leaving open the question of a due process right to be represented by retained counsel. (411 U.S. at 783 & n.6.) By thus limiting its inquiry, the Court also left undecided the extent to which the *equal protection* clause, under Douglas v. California (1963) 372 U.S. 353 and Griffin v. Illinois (1956) 351 U.S. 12 and their progeny, provides a right to appointed counsel as a necessary concomitant of recognition of a due process right to retained counsel.

Similarly, we cannot now specify precisely when legal assistance is required and when, if required, it must be rendered by a qualified attorney. It is no more appropriate for us than it is for the Supreme Court to write a code of procedure. (*Morrissey v. Brewer, supra* at 488.) In the first instance it is the responsibility of the prison officials—subject to approval by the district court—to evaluate in the context of the rules of the particular institution the severity of the various sanctions imposed by disciplinary committees and, once some form of "schedule" has been formulated, to decide which types of disciplinary actions are sufficiently serious to require the assistance of a qualified attorney and which require at least "counsel-substitute." In making these complex evaluations, the prison officials should consider, *inter alia,* the problems of using staff members to assist the accused inmate which may result from the inevitable conflict between loyalty and responsibility to the institution and a desire to aid one's "client" (*see* Harvard Center for Crim. Justice, *supra,* 63 J. Crim. L. at 208); the desirability of providing "outside" counsel or counsel-substitute rather than relying on mutual inmate assistance to limit the instances of inmate "lawyers" gaining coercive power within the prison social structure (*see In re Harrell* (1970) 2 Cal. 3d 675, 685; 470 P. 2d 640, 87 Cal. Rptr. 504); the availability of members of the bar through publicly funded and voluntary programs operating in the vicinity of San Quentin; the proximity of the institution to law schools and the extent to which law students may be available to function as counsel-substitute; and the

possibility of using paraprofessionals, trained and supervised by qualified attorneys, to serve as counsel-substitute *(see Corrections, supra* at 26). Accordingly, we hold that the district court properly required the defendants to submit a plan for the conduct of disciplinary hearings at San Quentin consistent with both the minimum due process requirements we have enumerated and the requirement that counsel or counsel-substitute be provided before "serious" sanctions may be imposed.

Finally, we also agree with the district court's holding that a prisoner must be afforded counsel (and not merely counsel-substitute) when he is required to appear before a prison disciplinary committee for violation of a prison rule which may also be punishable by state authorities. In *Mathis v. United States* (1968) 391 U.S. 1, the Supreme Court held that the interrogation of an incarcerated suspect, whether or not intended to obtain evidence for a criminal prosecution and whether or not related to the offense for which the inmate questioned has been imprisoned, is "custodial interrogation" under *Miranda v. Arizona* (1966) 384 U.S. 436. To protect his Fifth Amendment privilege against self-incrimination, an inmate subjected to such custodial interrogation is entitled to be advised of his right to remain silent and is entitled to have an attorney present—if he wishes—before further interrogation is constitutionally permissible. (391 U.S. at 3-4.) It follows from *Mathis* that if the disciplinary committee directed questions at the accused inmate, he would be subject to "custodial interrogation" and would have a Fifth Amendment right to re-

main silent and a right to be represented by counsel (retained or appointed) while subject to such questioning. Failure to recognize these rights would render the disciplinary hearing constitutionally invalid.[22]

Under the disciplinary procedures utilized in San Quentin at the commencement of this lawsuit, however, inmates were not asked questions by the disciplinary committee. Instead, a prisoner was given standard *Miranda* warnings (but told that the right to counsel attached only when he was questioned by the district attorney), and then was given the opportunity to explain his conduct. We agree with the district court's conclusion that the "opportunity to explain" was in actuality a subtle form of interrogation. In effect, the disciplinary committee presented the evidence against the prisoner and then said to him, "And what do you have to say about that?" The interrogative nature of the hearing, however, does not depend on an absence of other procedural protections, as the district court apparently concluded. (328 F. Supp. at 779 & n.7.) A disciplinary hearing is inherently in-

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[22]The Supreme Court has consistently invalidated impermissibly coercive governmental actions which have as their goal compulsion of self-incriminatory statements and has attempted to remedy the coercion by returning the injured parties to the *status quo ante*. (*E.g.*, Lefkowitz v. Turley (1973) 414 U.S. 70, 79-84; Gardner v. Broderick (1968) 392 U.S. 273.) The *Miranda* Court recognized that custodial interrogation was inherently coercive. (384 U.S. at 445-58.) Without the procedural safeguards it formulated (or equally effective legislative procedures for apprising accused persons of their right to silence (*id.* at 467)), custodial interrogation was held to be impermissibly coercive. (*Id.* at 467-79.) Accordingly, failure to satisfy the *Miranda* procedural guarantees when required in a prison disciplinary hearing would render the hearing itself impermissibly coercive; and, consistent with *Turley* and *Gardner*, the accused inmate may seek judicial relief from any consequences of the hearing.

quisitive. It is designed to induce revelation of all the facts, including the accused inmate's version of them. The prison disciplinary hearing forces the prisoner into a situation of "interrogative custody," and the prison authorities must safeguard the inmate's privilege against self-incrimination. Adequate protection is provided either by postponing disciplinary action until after criminal proceedings have been completed by the courts or by providing the accused inmate with an attorney and advising him of his right to silence pursuant to the requirements of *Miranda v. Arizona, supra.*[23]

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[23]In holding that an accused inmate is entitled to "use immunity" for statements he might make within the prison disciplinary hearing, the First Circuit appeared to assume that a prisoner has no right to remain silent in the disciplinary hearing without his silence being used against him. (Palmigiano v. Baxter, *supra*, at 1289-90.) We agree, as of course we must, that if a prisoner is compelled to answer questions or to explain his conduct under either prison regulations or because he has been advised that his silence will be used against him in the disciplinary hearing, his answers are inadmissible against him in a later criminal prosecution: a prisoner may rightfully refuse to give testimony which might tend to show that he had committed a crime "unless and until he is protected at least against the use of his compelled answers (and evidence derived therefrom) in any subsequent criminal case in which he is a defendant." (*E.g.*, Lefkowitz v. Turley, *supra* at 78; Kastigar v. United States (1972) 406 U.S. 441; Garrity v. New Jersey (1967) 385 U.S. 493.)

However, as we have already indicated, there is, absent a grant of use immunity, a right to remain silent at a disciplinary hearing without that silence being used against the inmate, based on *Miranda* and *Mathis*. Nevertheless, *Miranda* itself recognized that this right (as well as the right to counsel) may be voluntarily waived by the suspect, provided that he first has been clearly informed of his rights. (384 U.S. at 475.) Similarly, the accused inmate can waive his right to remain silent. To be sure, the inmate faces a dilemma. If he remains silent, he yields a valuable defense and risks serious punishment; if he decides to speak in his own defense at the disciplinary hearing, however, he risks self-incrimination in a subsequent criminal prosecution. But the necessity of making this difficult choice does not render the decision to speak

The decree and orders of the district court are modified only to the extent necessary to comply with our opinion; in all other respects the decree and orders of the district court are affirmed. The cause is remanded to the district court for further proceedings consistent with the views herein expressed.

KILKENNY, Concurring and Dissenting:

I agree with the majority's treatment of the three-judge issue, but I do not condone the strictures placed by the majority on the overall impact of *Preiser v. Rodriguez,* 411 U.S. 475 (1973), in connection with the exhaustion of state remedies.

Utilizing *Wilwording v. Swenson,* 404 U.S. 249 (1971), in support of jurisdiction, the majority incorrectly says: ". . . Plaintiffs attack neither the fact nor the duration of their confinement." The inaccuracy of this statement is demonstrated by the following quotation from Clutchette's amended complaint:

"coerced" nor does it require a grant of use immunity. It has long been held that when a witness voluntarily testifies in a civil or criminal proceeding, he has waived any Fifth Amendment right to object to subsequent use of such testimony. (4 J. Wigmore, *Evidence* § 1066, at 82 (Chadbourn rev. 1972); 8 *id.* § 2276 (McNaughton rev. 1961); *see* Simmons v. United States (1968) 390 U.S. 377, 394 n.23. *See also* Brown v. Unted States (1958) 356 U.S. 148.)

In essence then, the prison authorities have a choice: either they can gurantee a right to silence without the silence adversely affecting the accused inmate and provide *Miranda* safeguards, thus preventing the disciplinary hearing from being impermissibly coercive, in which case there is no right to use immunity if the prisoner decides to speak at the hearing; or they can require that the inmate speak in his own defense (*see* Gardner v. Broderick, *supra,* 392 U.S. at 278-79 (dictum); Palmigiano v. Baxter, *supra*), in which case use immunity follows as a necessary consequence of the compelled disclosures. (Garrity v. New Jersey, *supra.*)

> **"In addition to the above punishments imposed upon plaintiff CLUTCHETTE by the disciplinary committee, the action of the disciplinary committee will be referred by defendants to the California Adult Authority, which under California law is charged with the responsibility of setting plaintiff's sentence and term of imprisonment and determining whether plaintiff should be released on parole. Resolution No. 216 (6/5/64) of the Adult Authority requires that a report of all disciplinary actions involving an inmate be presented to the Adult Authority at the time when the Adult Authority considers the fixing of the sentence and parole date. On information and belief, the Adult Authority takes into consideration and views unfavorably disciplinary records of the kind involved in plaintiff's case. Therefore, the action of the disciplinary committee in finding plaintiff guilty of misconduct *and imposing serious punishment may seriously prolong plaintiff's actual term of imprisonment.*"** [Emphasis supplied]

Paragraph (c) of the prayer requests the following relief:

> "(c) A preliminary and permanent injunction setting aside the disciplinary actions taken against plaintiff CLUTCHETTE on November 20, 1970, and against plaintiff JACKSON on November 25, 1970, *expunging such actions from defendants' records, restraining defendants from reporting such actions to the Adult Authority and reinstating plaintiffs' normal prison privileges;*". [Emphasis supplied]

Jackson makes precisely the same charges.

That the duration of appellees' imprisonment is at stake is made clear by the findings of the trial judge from which I quote:

> "Needless to say, an inmate's prison behavior is a key factor in the Adult Authority's decision making process. Currently, Resolution No. 216 (6/5/64) of the Adult Authority requires that a report of all disciplinary actions be presented to the Adult Authority at the time it considers the fixing of sentence and parole date. While a disciplinary proceeding cannot result in loss of good-time credits—since there are no good-time credits in California due to the internal inconsistency of earning credits against an indeterminate sentence —*it is obvious that disciplinary action taken against a prisoner and reported to the Adult Authority can and does have an adverse effect on the length of his sentence, parallel to the loss of good-time credits in other jurisdictions.*
>
> "If the disciplinary committee finds an inmate guilty of a disciplinary offense occurring after the Adult Authority has set his sentence and parole date, the offense must be reported to the Adult Authority for immediate action. *A single disciplinary offense is sufficient cause for the Adult Authority to rescind the parole release order and reset the prisoner's sentence at the statutory maximum,* and the disciplinary committee is authorized to recommend that the Adult Authority rescind the parole date." 328 F. Supp. 767, 777 (N.D. Cal. 1971). [Emphasis supplied]

Following through on these findings of fact, the lower court, as part and parcel of its judgment, declared:

> "4. The decisions of the disciplinary committee in the disciplinary hearings of the named plaintiffs, Clutchette and Jackson, are set aside, and said plaintiffs shall be restored to the status of confinement they enjoyed prior to the institution of such proceedings, *and such decisions shall be expunged from all their records, and shall not be referred to the Adult Authority;*". 328 F. Supp. 784 (N.D. Cal. 1971). [Emphasis supplied]

In light of appellees' complaint, and the court's findings, I would hold that *Rodriguez, supra,* is controlling and that appellees should be required to exhaust their state remedies before resorting to other relief. I speak to the merits only under the compulsion of the majority holding that appellees need not exhaust their state remedies.

ON THE MERITS

At the outset, we must recognize the fundamental difference between a normal society and a society within prison walls. The absolute necessity of strict security and discipline, with its troublesome, but unavoidable, restraint on an inmate's freedom to act, is a controlling principle of safe and efficient prison administration. The inherent characteristics of a prison community are such that prison officers, such as here, must make prompt decisions as problems confront them, and this governmental interest in maintaining disciplined order in the prison far outweighs the individual interest in perfect justice. Here, the officers were faced with two defiant prisoners who refused to obey orders. The confrontation turned the prison vis-

iting room into a bloody battleground, in which Clutchette assaulted one of the officers with leg of a broken chair and, in turn, was placed in handcuffs. In these circumstances, due process is highly flexible and calls for only those procedural protections which the situation suggests.

I will respond to the contentions of the majority in the order in which they are set forth in the opinion.

NOTICE

Before us are the written institutional guidelines and procedures to be followed by the officers of the institution in disciplinary matters. First, there is the detailed code of rules of the Director of Corrections and of the Wardens and Superintendents of the State of California Prison System. Within this Code are the specific rules guiding the officers of San Quentin Prison in the administration of inmate discipline. Second, there is the San Quentin Prison Institution Plan for the Administration of Inmate Discipline. This Plan is divided into four specific chapters consisting of: (I) general introduction, (II) administrative policies and responsibilities, (III) operating procedures with reference to inmate discipline, and (IV) disciplinary unit operations. Section ID-II-OI provides that: ". . . when the conduct of an inmate results in a serious violation of the rules, or of the law, . . ." it is the duty of the employee having knowledge of the violation to immediately report the facts in writing on a Form CDC-115.[1] This Form, "Report

BEST COPY AVAILABLE

FOOTNOTE 1/

DEPARTMENT OF CORRECTIONS

REPORT OF VIOLATION OF INSTITUTION RULES

SAN QUENTIN STATE PRISON
(Institution)

To the Warden-Superintendent

I, J.V. HAHN, Visiting Rm. Of, hereby charge CLUTCHETTE (Name) B-4804 (Number)

with violation of institution rules and regulations ~~INMATE BEHAVIOR~~ OBEYING ORDERS (Title)

D1201-D1202 (Number) on or about Saturday 11-14-70 (Day) (Date) 1:35 A/S P/S (Time) p.m., the circumstances of which are as follows: REFUSING TO OBEY A DIRECT ORDER BY AN OFFICER, MIS-CONDUCT IN THE PRESENCE OF VISITOR, CONDUCT THAT COULD LEAD TO VIOLENCE.

"SEE ATTACHED SUPPLEMENTAL REPORTS"

Refer to A.C.DCM
Cell status pending DCM

J.V. Hahn
J.V. HAHN, Visiting Room Officer (Reporting Employee)

Custody Max Post #65

R.O. Hahn R.C. Lt 11-19-70

FOOTNOTE 1/ CONTINUED

DEPARTMENT OF CORRUCTIONS

Dec 191

REPORT OF VIOLATION OF INSTITUTION RULES

SAN QUENTIN PRISON
(INSTITUTION)

To the Warden/~~Superintendent~~

I, K.F. FONCANNON, Sergeant, hereby charge CLUCHETTE (NAME) B-4804 (NUMBER)

with violation of institution rules and regulations INMATE BEHAVIOR (TITLE)

D-1201 (NUMBER) on or about SATURDAY 14 NOVEMBER 1970 (DAY) (DATE) at 2:00 A.M. P.M. (TIME), the circumstances of which are as follows: (ASSAULTING AN OFFICER)

(SEE ATTACHED SUPPLEMENTAL REPORT)

Refer to A.C.D.C.M
Cell Status Pending D.C.M.

K.F. Foncannon

KF FONCANNON (REPORTING EMPLOYEE) Sergeant

Custody Max Post #22, Main Yard Sergeant

R.O. Hahn R.C. Lt 11-19-70

of Violation of Institution Rules", sets forth the facts which form the basis for the purported violations. The Form, after completion, is forwarded to the writer's (officer who submitted the Form) "area supervisor" for screening. If the supervising officer concludes that the charge is legitimate, and the report is properly prepared, the supervisor will indicate approval by initialing the Form, and will then forward it to the Custody Officer for scheduling on the appropriate Hearing Court Docket.

To be complete, the Form must set forth the nature of the voliation, when it occurred, where it occurred, and who committed the violation. The attached supplemental reports mentioned on the face of the Form were introduced in evidence as appellant's Exhibit One. These reports were prepared by correctional officers who either participated in the struggle, or witnessed the incident in the visiting room.

The Form is not given to the inmate, but the charges set forth therein are read to him within twenty-four hours of the infraction, and again at the hearing. In the instant case, both the Form, and portions of the supplemental reports attached thereto, were read to Clutchette at the hearing. Additionally, when an inmate commits an infraction sufficient to warrant an appearance before the disciplinary committee, a CDC Form 263,[2] or "Notice of Complaint", is prepared.

FOOTNOTE 2 /

Date ....., 19.....

NOTICE OF COMPLAINT

..... (Name) ..... (Number)

1. You are hereby notified that a written complaint has been filed against you. A copy of the complaint is attached hereto or the charge(s) against you listed hereon.
2. A hearing on the charge(s) will be held at .... on the ..... day of ..... 19....., or as soon thereafter as the matter can be heard.
3. At that time, the Adult Authority or its representatives committee of prison officials, as provided by the California Penal Code and Adult Authority Resolutions, will conduct a hearing to determine your guilt or innocence, and when applicable, a determination will be made regarding:
   a. Revocation of parole (Sec. 3060 P.C.)
   b. Forfeiture of credits (Sec. 2923 P.C.)
   c. Refixing of term (Sec. 3020 P.C.)

CHARGE(S)

CALIFORNIA ADULT AUTHORITY
Classification and Parole Representative

I hereby acknowledge receipt of a copy of the complaint specified above or attached hereto and a copy of the foregoing notice of hearing.

Dated ....., 19..... ..... (Name) ..... (Number)

NOTICE TO PAROLE VIOLATORS: By virtue of Adult Authority Resolutions when parolees are suspended, terms are refixed at the maximum, and on commitments received prior to January 1, 1968, credits for the semi-annual period are disallowed.

CDC 240

No. C 70-2497
Court Exhibit No. 2
Filed DEC 4 - 1970
James E. Welsh, Clerk
By ..... Deputy Clerk

This Notice must contain the inmate's name and number, the probable date of appearance before the disciplinary committee, and the charge. The Notice is read to the inmate prior to the hearing, and in accordance with prison rules must be completed in duplicate with the original going to the inmate for his signature. In the instant case, the Notice introduced in evidence was in blank. However, appellees' only witness testified that the Notice contained the violations in language similar to that used on the Form CDC-115. It is noteworthy that appellees' sole witness testified that the Notice was tendered to Clutchette for his signature, but Clutchette refused to sign it.

Even conceding, which I do not, that the rights of an inmate in prison are precisely the same as the rights of a parolee at liberty, as those rights are enunciated in *Morrissey v. Brewer,* 408 U.S. 471 (1972), I would hold that the disciplinary notice requirements of the San Quentin Prison, as previously outlined, are constitutionally adequate and that we should not force upon the warden a set of guidelines which could seriously impair the effectiveness which inheres in prompt prison disciplinary proceedings.

RIGHT TO BE HEARD AND TO PRESENT WITNESSES

I am unable to find anything in the regulations which would prevent inmates from testifying, or from calling witnesses in their own behalf. True enough, a prison official testified that an inmate is not allowed to call witnesses. If this be the fact, the procedure

should be changed. To this extent, I concur in the opinion of the majority. However, I do not believe that an inmate is entitled to call, for the purpose of confrontation and cross-examination, the persons who filed charges against him. This subject will be discussed under the next heading.

RIGHT TO CONFRONTATION AND CROSS-EXAMINATION

One of the most controversial questions in the field of prisoners' rights is whether inmates should be permitted to confront and cross-examine the person making the charge against them. A good many courts and commentators, in weighing the interest of the inmate against that of prison administration, have concluded that the prison's interest in security must yield to the inmate's right to confront and question his accusers. Cases along this line are cited in the majority opinion. In general, I would say that the state's interest in prompt, decisive action decidedly outweighs the individual inmate's interest in cross-examining the superintendent, the guard, or the fellow prisoner who might have made the charge against him. This is particularly true where, under the regulations, there is no prohibition against the inmate calling witnesses and testifying in his own behalf. Such a confrontation would inevitably go beyond the usual consequences of a cross-examination in court. The imposition of the right to confrontation would lead to a chaotic procedure where in every instance of discipline the inmate would insist on confronting his accuser. It is only in rare cases that even a pa-

rolee is entitled to the additional procedural safeguard of the right to confront witnesses and in those special instances the burden is on the parolee to allege facts demonstrating that the failure to provide this procedural safeguard is, under the circumstances of his case, an essential element of due process. *Dennis v. California Adult Authority,* 456 F.2d 1240 (CA9 1972).

If it is only in exceptional cases that a parolee is entitled to confront his accusers, then, beyond question, it is only in very exceptional cases that an inmate in a prison may be accorded such a right. I would not grant a wholesale right of cross-examination and confrontation to inmates, but would limit the right to those cases where the loss to the inmate might be "severe" or "grievous". Here, I would say that the charges against appellees were "grievous" and that under these circumstances, they should have been allowed to confront their accusers. Generally, *Meyers v. Alldredge, Warden,* ..... F.2d ..... (CA3, Feb. 14, 1974), is in support of these views. Moreover, except in the most unusual cases, the prison authorities should not be compelled to identify other prison inmates who supplied information as to the conduct of the accused. Such a disclosure, in all probability, would lead to reprisals against those assisting in prison discipline and in such cases the safety of the cooperating inmates far outweighs any alleged right of the accused to confrontation and cross-examination. This flow of valuable information would cease if the accused had the rights suggested by the majority. The evidence contained in the written statements

and considered by the committee should be likened to the statements in a pre-sentence report considered by the sentencing judge, *Cf. United States v. Weston,* 448 F.2d 626, 633 (CA9, 1971), *cert. denied* 404 U.S. 1061 (1972). The majority would give an inmate greater rights than those of a defendant prior to sentencing.

A "NEUTRAL AND DETACHED" HEARING BODY

To the extent that an inmate, prior to the imposition of sanctions, has a right to be heard by an impartial disciplinary committee, I concur with the majority. However, I am not convinced that a member of the disciplinary committee should be barred from sitting merely because he participated in the case in an investigatory capacity or because he might have some knowledge of the material facts relating to the inmate's involvement. The promulgation and enforcement of such a rule would paralyze the execution of prison disciplinary procedures. It is probably seldom, if at all, that the facts in a major or "severe" prison disturbance are not broadcast, by underground or otherwise, to the entire prison population. Consequently, most, if not all, of the prison officials would have some knowledge of the affair. The enforcement of such a rule would be akin to preventing a judge from testifying in a case in which he was presiding. Needless to say, there is no such rule. Of course, a member of the disciplinary committee with knowledge of the facts outside of the record as presented, should not take those facts into consideration in the decisional

process. Here, the record shows that a member of the disciplinary board arrived on the scene of the incident a short time after it occurred. Thereafter, he observed the appellees being restrained with handcuffs. There is nothing whatsoever in his report that would indicate he in any way participated in the investigation or had any knowledge of the incident other than to say that Clutchette allowed examination of the cut on his head and refused medical aid. Nothing in the record even suggests that this member of the committee had any inside knowledge of the occurrence. Therefore, I would hold that the disciplinary committee was constitutionally constituted.

A DECISION BASED ON THE EVIDENCE PRESENTED

I concur in the majority's view that the decision of a disciplinary committee must be based on the evidence presented at the hearing and that it should state briefly the reasons for its decision. However, I would not require the committee to recite the evidence on which it relied in reaching its decision.

RIGHT TO COUNSEL

I have already expressed myself on this subject in my dissent in *Palmigiano v. Baxter,* 487 F.2d 1280 (CA1 1973), and I find nothing in the observations of the majority to change my views. The presence of counsel at hearings in prison disciplinary proceedings would create havoc. Counsel's presence would be meaningless unless they could participate in the proceedings. If, as I said in *Palmigiano,* a defendant under

indictment for the major crime of bank robbery, is not entitled to the presence of counsel during a display of photographs arranged for the specific purpose of identification, I cannot bring myself to believe that a prison inmate, with very limited rights, is constitionally entitled to counsel at a disciplinary hearing, even though the hearing might result in "severe" or "grievous" loss to the inmate. Always to be kept in mind is the fact that a prison disciplinary proceeding is not to be equated with a criminal trial.

An inmate is charged with a violation of a disciplinary rule, not with a criminal offense. The charge might incidentally involve a crime under state or federal law, but a finding of guilt in the disciplinary action would in no way affect the inmate's rights in a criminal action growing out of the controversy. The majority's reliance on *Mathis v. United States,* 391 U.S. 1 (1968), is completely misplaced. The distinction between our case and *Mathis* is readily apparent. There, although the defendant was in custody, he was only a suspect and was entitled to his full constitutional rights. Here, as every one concedes, the inmates' constitutional rights were severely narrowed upon their conviction and imprisonment. By strong implication *United States ex rel. Miller v. Twomey,* 479 F.2d 701, 715-716 (CA7 1973); supports my view. *Meyers v. Alldredge, supra,* is directly in point and holds that inmates are not entitled to counsel in prison disciplinary proceedings. In *Meyers,* the court said:

> "The need for legal skills is less acute at a prison hearing, where there are no formal evi-

> dentiary rules, and the interjection of counsel in prison disciplinary hearings would severely conflict with and undermine the prison administration's interest in summary disposition of disciplinary matters." Slip op., at 22.

What was said in *Mathis* in connection with the right to counsel has no application to our factual background.

The majority proposal that disciplinary proceedings be postponed until after criminal actions have been completed in the courts would be impossible of fulfillment in the atmosphere of a prison where maximum security is required. The postponement suggestion is even more unique than the "use immunity" proposal outlined in *Palmigiano v. Baxter, supra.* The only alternative to postponement offered by the majority is that the accused inmate be provided with an attorney under *Miranda* guidelines. I cannot accept either proposal.

The trial in the lower court was at best a bobtailed affair. There never was a trial on the merits unless it can be said that the hearing on the application for a preliminary injunction took the place of a full-fledged trial. As the record now stands, it is next to impossible to decide the precise procedures followed in this case. Appellees called the only witness, an official in the San Quentin system. A trial on the merits in the state court would certainly clear the atmosphere and give the courts a solid ground on which to base a ruling. Despite appellees' argument that appellants waived their right to a trial on the

merits, as provided for in Rule 65 (a) (2), FRCivP, I believe such a trial would give a court a much clearer picture of what occurs in disciplinary proceedings in San Quentin.

CONCLUSION

Since appellees made no attempt to exhaust their state remedies, I would reverse and give the state courts an opportunity to judicially examine, in a full blown trial, the constitutionality of the prison rules and of the procedures utilized to enforce them.

BEST COPY AVAILABLE

appendix

Supreme Court, U. S.
FILED
AUG 7 1975
MICHAEL RODAK, JR., CLERK

SINGLE APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1194

J. J. ENOMOTO, et al.,
Petitioners,

VS.

JOHN WESLEY CLUTCHETTE, et al.,
Respondents.

**Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

Petition for Certiorari Filed March 20, 1975
Certiorari Granted June 9, 1975

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SINGLE
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DOCKET ENTRIES

Civil Docket
United States District Court
C-70-2497 AJZ

John Wesley Clutchette,

vs.

Raymond Procunier,
Louis Nelson,
James Parks and
John Does Nos. 1 thru 15.

Attorneys:

For Plaintiff:
Silliman & House
130 West Gabilan, Salinas, Ca. 93901
William Bennett Turner, Oscar Wills,
12 Geary St., S. F. Cal. 94108
788-8736.
John Thorne,
510 North Third St., San Jose, Calif.
Fay Stender,
5406 Claremont Ave., Oakland, Calif. 94618

For Defendant:
Evelle J. Younger, Atty. Gen. of Cal.
6000 State Building, S. F. Calif.

STATISTICAL RECORD

J.S. 5 Mailed 11/20/70
Basis of Action: Civil Rights Damages $30,000.00
Civil Rights Act

Date	Proceedings
1970	
Nov 20—	
	1. Filed complaint—no process
	2. Filed Memo in Support of Mo for a TRO and OSC
	3. Filed ORDER to Show Cause-defts to appear at 10:00 AM 12/4/70
Dec 3—	
	4. Filed Suppl Memo of Points & Auths in Suppt of Mo for Prelim. Injunction
	5. Filed amended complaint for Declaratory Judgment, Injunctive Relief and Damages
Dec 4—	
	ORD aft hrg-case con't to 1/4/71 for submission of briefs (Zirpoli)
Dec 9—	
	6. Filed summons on ret ex as to Raymond Procunier, Louis Nelson, and James Park
Dec 22—	
	7. Filed Pltfs Post-hearing Memo in Support of Mo for Prelim. Injunc.
1971	
Jan 4—	
	ORD aft hrg-Con't to Jan 14 for submission
Jan 14—	
	8. Filed Memo of Points and Auths in Oppos to Mo for Prelim Injunc.

Date	Proceedings
Feb 4—	
	9. Filed Change of Address of Attys Turner & Williams
June 21—	
	10. Filed Memorandum Opinion & Order. (Declar. Judg. & perm. inj. Grt.) (AJZ)
Jul 1—	
	11. Filed Notice of Mo for New Trial, to Amend findings of Fact and For a stay pending appeal on for hrg mo July 12, 1971 @ 1:30 p.m.
July 9—	
	12. Filed defts notice of withdrawal of motion for new trial
July 13—	
	13 Filed Pltiffs Memo in opposition to mo for stay pending appeal
Jul 15—	
	Ord Mo for stay pending appeal. Denied. Cont'd to Oct 22, 1971 for Post Judg't conference, @ 1:30 a.m. (AJZ)
Jul 16—	
	14. Filed notice of Appeal by Deft. Made & Mailed notice of appeal
	15. Filed Designation of record on appeal, of the Defts.
Jul 28—	
	16. Filed Designation of record on appeal, of the Pltfs.

Date	Proceedings
Aug 25—	
	17. Filed Reporter's transcript. Dec 4, 1970 Made and Mailed Record to CCA
Aug 26—	
	18. Filed Reporter's Transcript Dec 4, 1971
Aug 30—	
	19. Filed Receipt of record of CCA.
Sept 2—	
	Made, Mailed 1st Supplemental Record on Appeal 9th CCA
Sept 7—	
	20. Filed receipt of record from CCA
Sept 16—	
	21. Filed Ord of CCA that the Appellant's Mo for a stay of portion of the District Court's judgment, filed herein on Aug 27, 1971 is Denied
Oct 8—	
	22. Filed Mo for Enlargement of time of ten days
Oct 13—	
	23. Filed Ord for enlargement of time within which they must submit a plan for inmate discipline is enlarged to 10 days from the date their application for stay is ruled upon by the Circuit court (AJZ)
Oct 20—	
	24. Filed Ord of CCA:

In the United States Court of Appeals
for the Ninth Circuit

No. 71-2357

John Wesley Clutchette, et al.,
Appellees,

vs.

Raymond J. Procunier,
Appellant.

[No. 71-2357, C.A.9, Filed Oct. 19, 1971]
[No. 70-2497, U.S.D.C., Filed Oct. 20, 1971]

ORDER

Before: ELY and HUFSTEDLER, Circuit Judges.

The motions panel concerned with the subject case (Judges Ely and Hufstedler) has voted to deny the petition for rehearing and to reject the suggestion for a rehearing *en banc*.

The full court has been advised of the suggestion for an *en banc* hearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

[MoCal, Week of September 7, 1971]

United States Circuit Judges

E, Hu

Date	Proceedings
1971	
Oct 22—	
	Ord Post judgment conf hrg cont 1:30 p.m. Nov 9, 1971 (AJZ)
Nov 5—	
	25. Filed Pltifs Response to San Quentin Plan for inmate Discipline
Nov 9—	
	Ord post judgt conf hrg @ 1:30 p.m. 11-30-71
Nov 30—	
	Ord hrg cont to 1:30 p.m. Dec 14, 1971
Dec 14—	
	Ord hrg cont to 1:30 p.m. 12-21-71
Dec 14—	
	Filed Complaint and Affidavit of Contempt. (in file C71-649SW)
	Filed Ord to refile the document in that file C70-2497-AJZ (In file C71-649SW) Wil
Dec 21—	
	Ord post judg't conf cont hrg to 1:30 p.m. on 1-4-72 (AJZ)
1972	
Jan 4—	Ord cont to 1:30 p.m. on 2-8-72 for submission of post judg't conf
	26. Filed Inmate Discipline Plan
Jan 13—	
	27. Filed Pltifs interrogs

Date	Proceedings

Feb 4—

28. Filed Stip and ord for Continuance of hrg on disciplinary Plan. On for hrg Feb 8, 1972 @ 1:30 a.m. (AJZ)

Feb 25—

29. Filed defts' Objectns & ANS to Interrogs

Feb 28—

30. Filed Stip ext time to 3-13-72 for defts to ans interrogs

31. Filed ORD cont'g hrg from 2-29 to 3-30-72 (AJZ)

Mar 23—

32. Filed Stip & ORD cont'g hrg on disciplinary plan from 3-30-72 4-27-72/1:30 (AJZ)

Apr 13—

33. Filed Stip & ORD cont'g hrg on disciplinary plan from 4-27-72 to 5-18-72/1:30 (AJZ)

Apr 21—

34. Filed defts' not. of mo for lv to file 1st amend plan for inmate discipline, 5-18-72/1:30

May 15—

34(a). Filed Pltfs' Objectns to 1st Amend Plan for Inmate Discipline

35. Filed Pltfs' Memo in supp of objectns to 1st amend plan

36. Filed afdvt of Wm B Turner in supp of objectns to 1st amend plan

Date	Proceedings
May 18—	
	ORD: hrg on disciplinary plan cont to 6-9-72/ 1 pm
May 22—	
	37. Filed ORD that defts' 1st Amend Plan for Inmate Discipline is substituted for plan previously filed on 1-4-72 (AJZ)
June 9—	
	38. Filed defts' Response to pltfs' objectn to 1st amended plan of inmate discipline
June 15—	
	39. Filed ORD: defts to file report on administration of discipline plan no later than 8-8-72; Pltfs may file comments on this report & the matter will be deemed submitted on 8-8-72 w/o fur hrg (AJZ)
July 3—	
	40. Filed Stip & Order adding additional party with stip of fact attached
Aug 8—	
	41. Filed defts' Report on administration of discipline plan
Aug 17—	
	42. Filed pltfs' Comments on defts' Report to the Court
Nov. 30—	
	43. Filed reporter's transcript of 7/15/71
	44. Filed reporter's transcript of 5/18/72

Date	Proceedings
1973	
Oct 11—	
	45. Filed notice of call of the general civil list on for Nov 13, '73 @ 1 p.m. Clk
Oct 16—	
	46. Filed pltfs cert of counsel
Nov 13—	
	Ord case off dism cal (AJZ)
1974	
Aug 1—	
	47. Filed Order from the 9th CCA RE Hrg en banc DENIED. Appellant's counsel to file supp brief. Appellee's to ans
Nov 22—	
	48. Filed C.C. of the Judgt of the 9th CCA; Judgt of the District Court is REMANDED (AJZ) Sent Judgt to AJZ
	49. Filed receipt for case file being returned
Dec 19—	
	50. Filed Ord for hrg following remand, 1/3/75 @ 1:30 (AJZ)
Dec 24—	
	51. Filed Stip & Ord continuing hrg to 1/10/75 @ 1:30 (AJZ)

Date	Proceedings
1975	
Jan 10—	
	ORD: Special Hrg. Hrg on removal. Cont'd to 2/28/75 @ 1:30 for fur hrg (AJZ)
Jan 14—	
	52. Filed Pltf's Interrog's on remand
Jan 17—	
	53. Filed defts 2nd amended plan for inmate discipline
Feb 10—	
	54. Pltf's object. & memo in opp to 2nd amend. plan for inmate disc.
Feb 21—	
	55. Filed deft's response to Pltf's object's to the 2nd amended plan for inmate discipline
Feb 26—	
	56. Filed Pltf's reply memo & fur object to plan
Feb 28—	
	ORD: Special Hrg; Fur hrg on remand case to be submitted, as of 3/10/75 (AJZ)
Mar 4—	
	57. Filed c.c. of ord from the 9th CCA; Modification of opinion

D. C. No. 70-2497
D. C. Judge A. J. Zirpoli
Notice of Appeal
Filed 7/16/71
497 510 Fed. Rep. 2nd.
P. 613, 809
Filed in DC—11/20/70

United States Court of Appeals
for the Ninth Circuit

71-2357

Civil Rights DC, Northern California

John Wesley Clutchett, et al.,
Plaintiff-Appellee,
vs.
Raymond J. Procunier, Louis Nelson, et al.,
Defendant-Appellant.

For Appellees
Silliman & House
John Thorne, Esq
Franck, Hill, Stender,
William Bennett Turner, Esq

For Appellant
Calif. Atty Gen, SF
Wm D Stein, Deputy Atty Gen

Date	Proceedings			
1971				
Aug 31—				
	Deposit, R.	25.00	25.00	
	12 Wm. D. Stein (31768)			
	Treasurer U.S.	0		25.00
Sep 9—				
	Deposit, R.	10.00	10.00	
	Clerks F. Wm. D. Stein (31884)			
	Treasurer U.S.			10.00

Date	Filings-Proceedings

1971

Aug 27—Filed orig cert transc of record on appeal in two volumes; Vol I, Pleadings; Vol 2, Rptr's Transc, orig only; ($25)

Aug 27—Docket fee paid, cause doketed & entered appearances of counsel

Aug 27—Filed orig & 3 copies, appellant's motion for stay of injunction pending appeal — to panel 9/7/71. E, HU (C)

Aug 30—Returned orig rptr's transc to DC Clerk for copy under rule 4 (D). Rtd by DC—9-27-71

Sept 2—Filed Orig & 3 copies, appellees memorandum in opposition to motion for stay pending appeal—to Panel 9/7/71 E, HU (C)

Sept 3—Recvd three additional copies of Rptr's Transc, Vol 2 of Record.

Sept 9—Filed two add'l copies of Record. 173 pp Clerk's Fee (10.00)

Sept 9—Brief date set for Oct. 22, 1971.

Sept 13—Appellee copy of the record sent to W. B. Turner, Esq. per request.

Sept 13—Filed order (E & Hu) denying applts motion for a stay of a portion of the Dist Ct's judg

Sept 27—Filed orig & 25 Appellant's Petition for rehearing & suggestion for rehearing en banc. (on motion for stay)

Sept 27—Filed one add'l copy of Rptr's Transc.

Sept 29—Recvd. appellee letter of 9/28 re: pet for rehearing (E & Hu)

Date	Filings-Proceedings

Oct 18—Filed order (E & Hu) denying petition for rehearing & rejecting suggestion for rehearing en banc.

Oct 22—Filed 25 appellants briefs

Nov 22—Filed 22 appellees briefs

1973

Mar 23—Recvd. orig & 3 applt's motion for leave to file additional briefs, etc., to C. (rg)

Mar 28—Filed motion & Order (C) granting leave to file additional briefs and schedule as follows: Applt's. supplemental Brief to be filed within 40 days from this order; Appellee's suppl. brief to be filed within 30 days after service of applt's and Applt's. may have 14 days thereafter within which to file their suppl. reply brief. (fg)

Mar 28—Recvd. letter of March 27, 1973 from counsel William Bennett Turner appellee not opposing request to file supplemental briefs but does suggest a shorter period of time within which to file said briefs to C. (fg)

Apr 5—Filed order (C) RE: appellee's letter for shorter period for submission of supplemental brief for the applt.—The supplemental brief is due four weeks from date—4/3/73. [Due May 1, 1973]. (fg)

May 1—Filed 25 appellants supplemental briefs (fg)

May 21—Recvd letter of 5/17 from Deputy AG Stein re: Errata in appellant's Supplemental brief. (s)

May 30—Filed 25 Supplemental briefs of appellees. cs

Date **Filings-Proceedings**

May 30—Recvd 3 copies law review article entitled "Miranda in Prison: The Dilemma of Prison Discipline & Intramural Crime" in reference to appellees' supplemental brief. cs

Jun 11—Filed 25 Supplemental reply briefs of appellants. cs (Calendared 8/10/73)

Aug 2—Recvd orig & 3 appellees' addtl citations (Panel). bb

Aug 10—Cause argued & submitted to Hu, Tuttle & Kl, JJ (s)

Aug 15—Recvd orig & 3 appellee's addtl citation Panel). bb

Dec 5—Recvd orig & 3 of applt's add'l authorities (to panel). ty

1974

Apr 1—Per directive from court, Deputy Atty. Gen. requested to supplement the record with legible copies of Form CDC263 filled in with the necessary information now missing. Also copies of the Miranda Warning form signed by each of the defendants. This request made to William D. Stein, Deputy Atty. Gen. (Melfi)

Apr 2—Per directive from court, Deputy Atty. Gen. Wm. Stein was requested to supply court with "Exhibit 5". ty

Apr 5—Recvd from Deputy Attorney Stein copies of Exhibits 1, 2 and 4 (to Melfi for court). ty

Apr 9—Filed order (Tuttle, Hu, Kl) ordering Atty Gen, St. of Cal. to supplement record, etc. Fur-

Date Filings-Proceedings

ther ordered, applt counsel make a search of Clutchette and Thompson files to obtain these orig documents if in fact they do exist. Upon receipt of this supplemental material, counsel for appellees may state their objections if any to the court. ty

Apr 16—Filed cert supplemental record on appeal CDC form 263 "Notice of Camplaint" dated 19th November 1970 & unnumbered form titled "Specific Warning Regarding Interrogations") 4 cert copies (to the panel). ra

Apr 25—Ordered opinion (Hufstedler) filed Judge Kilkenny, concurring and dissenting opinion filed & judg to be filed & entd (jn)

Apr 25—Filed opinion—The decree and orders of the district court are modified only to the extent necessary to comply with our opinion; in all other respects the decree and orders of the district court are affirmed. The cause is remanded to the district court for further proceedings consistent with the views herein expressed.

Apr 25—Filed & Entered Judgment (jn)

May 9—Filed aplt's petition for rehearing & suggestion for rehearing en banc. To: All active judges. gb

July 12—Recvd aplt counsel's letter (orig) re: add'l citations & copy of Supreme Ct of the U.S. decision in *Wolff, Warden, et al. v. McDonnell*. Returned for add'l copies. cs

Date **Filings-Proceedings**

July 16—Recvd aplt counsel's letter (orig) re: add'l citations & copy of Supreme Ct of the U.S. decision in *Wolff, Warden, et al. v. McDonnell.* To all active judges. tj

July 22—Filed memorandum (G) returning case to the panel of Judges Tuttle, Hufstedler & Kilkenny. cs

July 29—Filed order (Tuttle, Hu & Kl) denying the hearing en banc, the original panel grants the petition for rehearing limited to the issue: "What is the effect of *Wolf v. McDonnell* (1974) ..... U.S. ..... [42 U.S.L.W. 5190] upon the case at bench?; further ordered, aplt's counsel is directed to file a supp'l brief upon this issue not later than 25 days following the filing of this order; aple's counsel is directed to file a responding brief not later than 15 days from date of service of aplt's brief and aplt's counsel shall file a reply brief, if any, not later than 10 days from the date of service of aple's brief. No oral argument will be heard unless the court shall otherwise direct after the closing brief has been filed. jr

Aug 23—Filed orig & 24 copies Aplt's brief on rehearing. (To Panel) tj (Aug. 23)

Sept 6—Filed orig & 24 copies Aple's brief on rehearing. (To Panel) (Sept. 6, 1974)

Sept 20—Recvd original and 24 copies of aplt's reply brief late. cl

Sept 26—Filed aplts' motion for leave to file late brief to (panel) with copy of brief. jr

Date **Filings-Proceedings**

Oct 21—Ordered opinion (*Hufstedler*) filed & judg to be filed & entd. jr

Oct 21—Kilkenny dissenting

Oct 21—Filed opinion—Remanded

Oct 21—Filed & Entered Judgment. jr

Nov 4—Filed aplts' suggestion for rehearing en banc and for modification and correction of opinions to (all active judges). jr

Nov 15—Issued judgment

Nov 20—Sent two volume record to district court; pleadings, orig. reporters transcript, orig and one copy, original exhibits. el

1975

Jan 27—Recvd. copy of SC letter of 1/24 extding time to 3/20 in which to file pet for cert. rh

Feb 27—Filed order (Tuttle, Hufstedler, Kilkenny, CJJ) modifying opinion by adding footnote "1" at the end of the first full paragraph of the opinion, as follows: ". . . issues untouched by *Wolff*.' 'Footnote 11 of the original opinion is modified by striking from the first sentence thereof the word 'voluntarily' and substituting therefor ordered to be.'" The petition to rehear the case following rehearing is denied . . . the suggestion for en banc consideration is denied. wt

Mar 28—Filed SC notice re: filing pet for cert 3/20/75 SC#74-1194. rh

June 18—Filed certified copy of SC order granting pet for cert June 9, 1975 (to panel). rh

In the United States District Court
Northern District of California

Before: Hon. Alfonso J. Zirpoli, Judge.

John Wesley Clutchette, et al., Plaintiffs, vs. Raymond Procunier, Defendant.	No. C-70-2497

Reporter's Transcript
December 4, 1970
Friday

Appearances:

For Plaintiffs:
Floyd J. Silliman, Esq.
William Turner, Esq.
Faye Stender, Esq.
Robert C. Wrigley, Esq.

For Defendant:
William D. Stein, Esq.
Deputy Attorney General

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Friday, December 4, 1970

The Clerk: Civil Case No. 70-2497, John Wesley Cluchette versus Raymond Procunier, et al., order to show cause.

Counsel please step forward and state their appearances for the record.

Mr. Silliman: Your Honor, Floyd Silliman, appearing on behalf of John Cluchette.

If I may at this time, I'd like to introduce the other people at the counsel table.

The Court: Yes.

Mr. Silliman: Mr. Bill Turner, a gentleman who will be assisting me in the presentation of the case. For the purposes of this hearing, I would like to move his admission to the District Court.

The Court: All right. He has been heretofore admitted in other District Courts?

Mr. Silliman: Yes, he has, Your Honor: In the District of New York and Maryland, also the Second Circuit, the Ninth Circuit, and he is a member of the New York State Bar.

The Court: He will be admitted for the purpose of this case.

Mr. Silliman: Thank you very much. Also seated at counsel table is Bob Wrigley, a recent graduate of Boalt Hall, who assisted on the preparation of the case. I would ask permission that he be allowed to stay at the counsel table.

The Court: Yes.

Mr. Silliman: And Mrs. Faye Stender, appearing today on behalf of Plaintiff George Jackson.

The Court: All right.

Mr. Stein: William Stein, Deputy Attorney General for the State of California, appearing on behalf of the defendant and respondent, Raymond Procunier.

The Court: Very well.

The Clerk: Thank you, Counsel.

The Court: You may proceed.

Mr. Silliman: Your Honor, my understanding is that the hearing today is going to be concerned principally with the constitutionality of the disciplinary committee hearings, such as they are, at San Quentin Prison, and that it will not be necessary or advisable to get into the merits of the underlying case.

I am prepared, if the Court should desire, with several affidavits, however, which would substantiate, at least, a question of fact about what occurred in the visiting room which led to the hearing before the disciplinary committee as far as John Clutchette is concerned. If the Court would like, I will file those at this time, or reserve them for some later date.

The Court: All right. May I inquire, did the State file a return?

Mr. Stein: No, Your Honor, the State has not filed a return yet. I think we would present some argument here this morning, and then if the Court deems it necessary, we will file a written response after the evidence is taken today.

The Court: All right. May I make one further inquiry? Does the State intend to file a motion to dismiss?

Mr. Stein: At this time, Your Honor, I, first, do not intend to make a motion to dismiss.

The Court: All right.

Mr. Stein: I will, however, at this time presen a motion that this matter should be heard by a three Judge Federal Court.

The Court: Well then, I think I had better hea this motion first.

Mr. Silliman: Very well.

The Court: This goes to any threshold jurisdiction this Court would have in the premises — this Judge. Yes, Counsel?

Mr. Stein: So, may it please the Court, the respondent, Raymond Procunier, is appearing here today in response to the order to show cause issued by this Court, to show cause why he should not be preliminarily enjoined from proceeding against the plaintiff in a disciplinary committee hearing without having afforded him the right to counsel, to call witnesses in his behalf and to cross-examine the witnesses against him.

The respondent is the Director of Corrections for the State of California, and pursuant to California Penal Code Section 5054, he is charged with the supervision of State prisons and the responsibility for the custody, treatment, training and discipline of the persons confined therein.

Now, the Director may prescribe rules and regulations for the administration of the prisons pursuant to California Penal Code Section 5058, and pursuant to the section he has promulgated the Director's Manual. In this manual, the Director's rules prescribe that each institution shall establish a plan for the adminis-

tration if inmate discipline, which plan must be submitted to the Director and must comply with his Manual For Prison Discipline, to be approved by the Director. This is California Director of Corrections Rule 4502.

Wherefore we respectfully submit that this Court is now being asked to enjoin the enforcement of an order of the Director of the California Department of Corrections concerning the nature of disciplinary hearings which are held statewide in all institutions under his control and for his responsibility, and we submit that an injunction pursuant to U. S. Code, Title 28, Section 2281, could not issue to enjoin the enforcement of this unless a three-Judge Federal Court is impaneled.

However, we will go on at this point to state that we feel that if evidence is taken of a preliminary nature today as to what the procedures are that are followed by the Disciplinary Committee, what the nature of the punishments imposed are, that it will become obvious to the Court that there is no substantial constitutional issue presented here, and that the Court could therefore dismiss its order to show cause which it issued, leaving the complaint stating an action for declaratory relief, which of course could be heard by this Court at a later date.

That's our position at this time, Your Honor.

We are ready to proceed to establish the procedures that are used by the Disciplinary Committees.

The Court: Now, may I ask you, do you have some authority on the first proposition, that by reason

of the fact that the Superintendent of Prisons has th authority by regulation to prescribe and to direct th issuance of a manual, that this requires the calling of a three-Judge Court?

Mr. Stein: Your Honor, it's our position that th procedure that are being attached here are the Direc tor's Statewide promulgations; that he is the admin istrative board of the State duly authorized by State statutes to promulgate these rules and regulations.

The Court: You don't have any authority to cite. Are you familiar with the three-Judge Court case pending here, involving the use of books in prison, et cetera?

Mr. Stein: You are referring to Lynch versus——

The Court: Gilmore.

Mr. Stein: Gilmore, yes.

The Court: Yes.

Mr. Stein: Yes, I am aware of that case.

The Court: Well, I'd better check that case. It had never occurred to me for a moment, very frankly, that there was a possibility of such a need. I shall check it out, because if that is the case, my memory serves me well, that case came back to this Court at the direction of the Court of Appeals—and I'm not going to comment whether the Court of Appeals was correct or not in its direction—but came back with the direction that the three-Judge Court be convened. At least I will give it some consideration.

However, even though that be the fact, the matters presently before the Court can be deemed temporary in nature or preliminary in nature, and your first question as to whether there is a substantial issue is

one that the Court would have to resolve even if it wanted to convene a three-Judge Court.

All right, now, do you gentlemen want to respond to the observations which have been made?

Mr. Silliman: Your Honor, if the Court please, I would ask Mr. Turner be allowed to respond.

The Court: Yes.

Mr. Turner: I hope I can put Your Honor's mind to rest on the three-Judge Court issue. Section 2281 requires a three-Judge Court only where there is a statute whose constitutionality is being challenged, or where there are administrative regulations of statewide applicability which are being challenged. Here we are challenging the disciplinary practice, not regulations.

As far as we understand it, there are no regulations, as they apply only at San Quentin Prison; and in Gilmore against Lynch, the Ninth Circuit Court of Appeals said in dictum that any practices relating to a particular prison and not involving statewide regulations could be reserved for a single Judge.

The Court: Well, but isn't counsel making the point that the Manual is equivalent to a regulation which has statewide application? And then I assume his theory would be that the practice which was followed is the practice prescribed in the Manual, so that in final analysis, from his point of view, the attack is an attack upon the equivalent of a regulation?

Mr. Turner: I think the evidence today will show Your Honor that the Manual in fact does not prescribe the precise disciplinary procedures which are under attack here.

The Court: All right. Do you want to proceed?

Or, first, his other statement is that the evidence will not disclose a substantial question. I assume for that I must hear the evidence first.

Mr. Turner: That's right. That's our evidence.

The Court: All right, you may proceed.

Mr. Turner: May it please the Court, the Attorney General has produced in court today one of the Correctional officers from San Quentin, who is thoroughly familiar with disciplinary procedures, and we would like at this time to call him as a witness.

The Court: All right.

Mr. Silliman: Mr. Apostol.

The Court: You may proceed.

JOHN APOSTOL,

called as a witness on behalf of Plaintiffs, having been duly sworn, testified as follows:

The Clerk: Will you please state your full name for the record, sir?

The Witness: My name is John Apostol.

The Clerk: Would you spell your last name?

The Witness: A-p-o-s-t-o-l.

Direct Examination

By Mr. Turner:

Q. Mr. Apostol, are you currently an employee of the California Department of Corrections?

A. I am.

Q. What is your position?

A. Program Administrator.

Q. Where are you assigned?

A. At San Quentin.

Q. How long have you held that position?

A. For about five years now.

Q. What did you do before that?

A. I worked for the Department of Corrections before that as Supervisor of Recreation at San Quentin.

Q. And before that?

A. A student.

Q. Is it fair to say you have spent your entire professional career at San Quentin?

A. Yes, sir.

Q. Have you——

A. Except for one year, let me say that, I was down at Southern Conservation Center for a year.

Q. Have you ever served as correctional officer?

A. No, I have not.

Q. What are your duties as program administrator?

A. It's to administer and supervise one of the housing units at San Quentin, what they call the Southwest Unit.

There are five housing units at San Quentin, I have one of the five.

Q. Your job is to supervise that unit?

A. That's right.

Q. What are your duties in supervising that unit?

A. Well, to administer the operation and to supervise the employees in the function of the operation of the units.

Q. Do you have any responsibility for disciplinary proceedings?

A. Well, I am also a member of the—or chairman of the disciplinary committee for that unit.

Q. Is it for that unit alone?

A. That's right, each unit has a separate disciplinary committee.

Q. What are your duties with regard to disciplinary proceedings at your unit?

A. One of two things: Either as a hearing officer or as a member of the disciplinary committee.

Q. Did you sit as a member of the disciplinary committee involving the case of John Clutchette on November 20?

A. I did, yes.

Q. Were there other members of the disciplinary committee who sat at that hearing?

A. Yes. You have to have three for a quorum,, and on that day we had four.

Q. Who were they?

A. Lieutenant Nelson, Lieutenant Luxford and Mr. Gifford.

The Court: Lieutenant Nelson, Lieutenant Wilson [sic]?

The Witness: Luxford.

The Court: Yes.

The Witness: And Mr. Gifford.

The Court: Is that Lieutenant Luxford?

The Witness: That's right.

The Court: And Mr. Gifford?

The Witness: Correct, yes.

The Court: Now, you are not a custodial officer, is that right?

The Witness: No, I am not designated as one.

The Court: All right. Lieutenant Nelson is?

The Witness: That's right.

The Court: And Lieutenant Wilson [sic] is?

The Witness: Nelson, Luxford, right, are both lieutenants.

The Court: All right. And Mr. Gifford—what is his?

The Witness: Correctional counsel.

The Court: Correctional counsel?

The Witness: Correct.

The Court: And you say that you at times served as both a hearing officer and a member of the hearing board?

The Witness: Right.

The Court: Now, what capacity were you serving on this occasion?

The Witness: I was the chairman of the committee on this day.

The Court: And who was the hearing officer?

The Witness: Well, I think I should differentiate between—when I say hearing officer, he is, as I say, on minor matters; if it's not a serious one, a hearing officer can hear it. This would be just a minor disciplinary. Where it's a serious type offense, then that would be referred to the committee, the hearing officer refers that to the committee.

The Court: All right.

The Witness: So that's the difference.

The Court: You may proceed.

Mr. Turner: Thank you, Your Honor.

Q. Were there any other persons present at the hearing?

A. I don't believe so.

Q. Did anyone transcribe the testimony or take down what happened at the hearing?

A. Well, the job of the correctional counsellor is to take down notes and record, you know, what occurred at the testimony. Not word by word, but . . . .

Q. Was that done at Clutchette's hearing?

A. That's right.

Q. Do you know what he did with those notes?

A. Well, that's the results of the disciplinary action, the findings, the disposition and the plea. In other words, he doesn't take a lot of detailed notes of what everybody says verbatim.

Q. Mr. Apostol, I would like you to explain for the Court just how the disciplinary procedure at San Quentin works. When does a disciplinary committee meet?

A. Once a week for each unit.

Q. How many cases does the committee hear at each meeting?

A. It could range from five to fifteen, depending what's occurred during the week.

That's about an average. I'd say may be about seven might be an average.

Q. On the average, how long would a disciplinary committee meeting take?

A. It could take anyplace from fifteen minutes to over an hour, depending on, you know, the detail of the committee or the action.

Q. For what offenses are inmates charged with disciplinary infractions that lead to a disciplinary committee hearing?

A. It would be what we call our major ones. This would be the escape offense, this would be assault offense, fighting, arson, sodomy, generally the cases that might be referred to the District Attorney.

Q. And those are also the cases that are heard by the disciplinary committee?

A. Those are generally the ones that are referred, right.

Q. Are there any rules or guidelines as to the form of the proceedings of the disciplinary committees as San Quentin?

A. There is an institutional plan that gives you guidelines and forms to follow, as far as procedure, right.

Q. Is that in writing?

A. Yes, we have, I say, a plan or manual on that.

Q. You didn't bring a copy with you today, did you?

A. I have got one.

Q. In court today?

A. Yes.

Q. Does the institution plan tell you how you are supposed to conduct the disciplinary hearing?

A. I am not sure exactly what you mean by that.

Q. Well, for example, does the plan say whether or not the accused inmate is entitled to call witnesses?

A. No, it doesn't specify that.

Q. Does it say whether he is entitled to be represented by an attorney or other counsel?

A. Doesn't specify that, no.

Q. Does it specify what records must be kept at the hearing?

A. Yes, it does.

Q. What records must be kept?

A. Well, "charged offense," which is what we call the 115——

Q. Would you explain for the Court what the 115 is?

A. Well, it's the—it details what the man is charged with, what rule it is. It shows who charged the inmate with the offense, and then on the bottom it shows what the plea was, the action taken by the committee. It would be the disposition, the finding.

Q. Mr. Apostol, I show you a copy of a form which purports to be California Department of Correction Form 115, which states a charge by a correctional employee, naming an inmate, and the time of an infraction and the rule violated. Is that the Form 115 that you testified about?

A. That's right.

Q. Is that also the Form 115 that was used for the Clutchette hearing?

A. That's right.

Mr. Turner: The document is composed of two pages, Your Honor.

Q. Were both pages used at the Clutchette hearing?

A. There are two different offenses, you write a separate 115 for each offense.

Q. And there were two offenses heard at the Clutchette hearing?

A. That's right, yes.

Q. And this Form 115 was the form that was used for both?

A. Right.

Q. At the bottom of the 115 form, there are spaces regarding plea and findings and disposition, Mr. Apostol. Are those the portions that are filled in by the correctional counsellor that you mentioned?

A. That's right.

Mr. Stein: Your Honor, at this time I would like to have marked, I think, for the convenience of the Court, Respondent's Exhibit 1, the forms that are being referred to.

The Court: All right, do you want to offer them?

Mr. Turner: We plan to offer it in evidence, Your Honor.

Mr. Stein: I plan to, also.

The Court: There is no objection?

Mr. Stein: I plan to offer it as a respondent's exhibit.

The Court: All right, it may be deemed as an offer on behalf of both plaintiff and respondent. For our present purposes and convenience, we will mark it Court's Exhibit No. 1.

The Clerk: Court's Exhibit No. 1. In evidence, Your Honor?

The Court: Yes, in evidence.

The Clerk: Marked in evidence.

[The form above-referred to was marked Court's Exhibit No. 1 and received in evidence.]

Mr. Turner: Q. Mr. Apostol, are inmates shown the Form 115 before they come to the hearing?

A. The hearing officer reads the 115 to the inmate. I don't say that he is, you know, given it, but he is read the 115 and——

Q. That happens at the hearing?

A. It happens at the preliminary hearing. What I should say is that within twenty-four hours the hearing officer will hear a 115, or a disciplinary committee. Now——

Q. Within twenty-four hours after the infraction?

A. Right, yes.

Now, if it's a minor type of offense, he can adjudicate it and handle it. If it's serious, then he will refer it to the committee. But at that time, when he sees the inmate, he will let him know what the offense is, and what we have is a notice of complaint that we put on there, what the offense is, and we present this to the inmate so he knows what he is being charged with.

Q. But he is not given anything in writing?

A. Yes, notice of complaint, he is.

Q. A notice of complaint?

A. That's right, yes, the notice of complaint is the form that tells him exactly what the charge is, and also states on there the time that he will be seen by the disciplinary committee. So at least he knows that.

Q. Is that an institutional form?

A. That is, yes.

Q. Do you have one of those in the courtroom with you today?

A. I think Mr. Stein has one.

Mr. Stein: Your Honor, I have some.

Mr. Turner: I think we ought to get it identified, Your Honor.

The Court: All right. Both sides want to offer it?

Mr. Stein: Yes, I intend to offer it.

The Court: All right, Court's Exhibit No. 2.

The Clerk: Court's Exhibit No. 2 introduced and filed in evidence.

Mr. Turner: Q. Mr. Apostol, I take it you do not know of your own knowledge whether such a form was given to John Clutchette before his hearing, do you?

A. Well, I wasn't the hearing officer, but at the committee we have a copy of the form indicating, you know, that he either received it or didn't receive it.

Q. Is the inmate advised in that notice of complaint form of the particular conduct that he is charged with having done?

A. Right. It will give a number of the director's rule and then what the title is.

Q. The director's rule, for example, regarding inmate behavior; would that be an example?

A. That's right, yes.

Q. And that would be all that would appear in the notice of complaint form?

A. And then it would say "inmate behavior," and then it might have in parenthesis in particular what it was—the inmate behavior that we are talking about.

Q. You don't know what it was in Clutchette's case? I mean in the notice of complaint form?

A. I don't have a copy, so I don't recall exactly what it was.

Q. Are inmates in disciplinary committee proceedings entitled to be represented by anyone?

A. There is no one present there with them, if you mean to present their case.

Q. Are they entitled to have a lawyer there?

A. No, not at the committee hearing.

Q. Are they entitled to have a fellow inmate there to assist them?

A. We generally don't do . . . . Well, I say we don't do that, no. There are reasons why.

Q. Are they entitled to have their counsellor or caseworker there to represent them?

A. Any other employee could be there, right.

Q. What I am asking is whether they are entitled to have a counsellor or caseworker represent them at the hearing.

A. There could be another employee there, although I don't recall where there's been one.

The Court: Well, is this a matter of right that you accord him, or request, or is it discretionary with the Board—with your committee?

The Witness: It's not discretionary with the committe, I can answer that.

The Court: Well, who determines whether they have a right to bring an employee? Let's assume the classification officer wanted to appear on behalf of one of the prisoners as to whom disciplinary action was about to be taken. Who determines whether that officer may or may not appear on behalf of a prisoner?

The Witness: Well, generally it's in written form. Most of the hearing we have is in writing. If an employee has something that he wants to say . . . . This is generally what I have experienced. If he wants to make a presentation or say something about an inmate or have some observation, he will make a written report on it and we would use that.

Mr. Turner: Q. But he wouldn't in any case be acting as the inmate's lawyer or advocate?

A. Yes. I haven't seen that.

Q. Are inmates at disciplinary hearings entitled to look at the 115 Form?

A. We read it to them. They don't actually physically hold it.

Q. They are not allowed to look at it?

A. That's right, no.

Q. Are they allowed to look at any of the reports that may have been made about the incident?

A. No, they don't physically handle them.

The Court: Well, is the record read to them?

The Witness: Yes, it's part of the committee action.

The Court: I note on this Exhibit No. 1 there is a statement, "See attached supplemental reports."

The Witness: Right.

The Court: So that this Exhibit 1 was in fact accompanied by attached supplemental reports, is that correct?

The Witness: That's right, sir.

The Court: And do you have the attached supplemental reports as to this particular——?

The Witness: I personally don't, but it's in his file.

The Court: All right.

Mr. Turner: Q. With regard to that Clutchette hearing, Mr. Apostol, were the officers' reports read to Clutchette at that hearing?

A. They were. There was quite a few of them. I don't say they were all read, but the main ones were

read to him, so he knew the charge and, you know, what occurred.

Q. They were read verbatim to him?

A. Yes.

Q. How long did it take?

A. Oh, I don't know. Five minutes, maybe less. I am not sure.

Q. Are inmates at disciplinary committee hearings entitled to call witnesses on their behalf?

A. Again, it's only in a written kind of a form. In other words, if there's somebody else that they want to have say something for them, they will, you know, if it's another inmate—they will write a report or something like that. But they won't be present.

Q. They are not present at the hearing?

A. That's right, they are not present at the hearing.

Q. What if the inmate, for example, wants to call a correction officer to testify on his behalf at the hearing? Is he entitled to do that?

A. It's not a practice.

Q. Pardon?

A. It's not a practice.

Q. And if he wants to call a civilian witness on his behalf, is he entitled to do that?

A. Not as a personal appearance. But here again, they can submit an affidavit or written, you know, description of what they feel or what they have seen.

Q. Do they have a right to do that?

A. Yes, they do, sure. I have had inmates do this. Generally an inmate doesn't like to get involved with another case there because, you know, there's problems

there. But I have had inmates stop and explain to me about what they, you know—what they have seen. And they will, you know, they will pass on information about, you know . . . .

Q. Do they do this at the hearing?

A. No, they may do it sometime before that, but not at the hearing itself.

Q. Are there any regulations or guidelines that provide that an inmate can submit written evidence at the hearing?

A. I don't know of any.

Q. I believe you testified before that the only record which is made of the hearing consists of the notations on the Form 115?

A. That's right. Or let me add this: 'If there's a change of custody or referral to the DA, then they have a "chrono" that we write out, which is a supplement. Or really it's a repeat of what's on the 115.

The Court: What is it they write out?

The Witness: It's a "chrono" that they submit.

The Court: A what?

The Witness: Short paragraph.

The Court: A what?

The Witness: "Chrono."

The Court: Well, how do you spell that word?

The Witness: C-h-r-o-n-o, "chrono."

The Court: All right! I suppose that's an abbreviation?

The Witness: That's right.

The Court: All right.

Mr. Turner: Q. Is there any requirement that the decision of the committee be based on substantial evidence?

A. You know, I'm not sure of exactly what we are saying about substantial evidence, no.

Q. Well, what is the standard by which the committee determines guilt?

A. By the written information that we have, plus discussion with the, or presentation that the inmate presents.

The Court: In other words, what you are telling us is, you get it all before you and you decide whether he did it or didn't do it?

The Witness: Oh, no. No, no.

The Court: What is it, then?

The Witness: It's what the written information is that we get, you know, that we read at the committee.

The Court: Yes?

The Witness: Plus what the inmate relates to us, too.

The Court: All right, then, you determine from that evidence whether he did in fact comport himself, or did engage in the particular conduct decided in the complaint?

The Witness: That's right, yes.

The Court: All right.

Mr. Turner: Q. Does guilt have to be proved beyond a reasonable doubt? Is that your standard?

A. I think it has to be reasonable. That's a hard one for me to answer.

Q. Are the inmates at disciplinary hearings who are sentenced to some punishment entitled to any appeal from that decision?

A. Yes, they are.

Q. What is that appeal procedure? What do they do?

A. They—well, any disciplinary action is reviewed by another person before it's finally approved. In our case it's the associate warden. It's an automatic review of the disciplinary committee. The committee action isn't final until he's approved it.

Q. How soon after the decision of the committee does the review take place?

A. Oh, I would say probably within twenty-four hours. It's a matter of typing it up and presenting it to him, not the approval. Now, there's an appeal also that, if the inmate wants to appeal or isn't satisfied with the action of the committee, then he can appeal this to the associate warden of custody. And they have done this. They will write to him, he will review the whole case, and if he has further evidence or disagrees, then he can take action himself.

He can expunge it or reduce the sentence. So they do have an appeal on that.

Q. Are inmates told at the time of the decision the reasons for the decision?

A. Generally, yes.

Q. Is there any requirement that they be told?

A. I don't say there's anything in writing that says that they have to, but it's a general practice, though.

Q. Are they told of their right to appeal from the decision?

A. I don't say that we do this all the time, but it is a general practice. I don't say that we sit there and say, you know, "You have a right to appeal."

But——

Q. Is there anything in writing that informs the inmates of their right to appeal from that decision?

A. I haven't seen anything like that.

Q. In the appeal to the associate warden, is the inmate allowed to appear before the associate warden?

A. He can, yes. He makes that decision. He can—generally what he will do is, he will review the 115, he will interview the man, call him in and then proceed from there

Q. Do you know whether that was done with regard to John Clutchette?

A. I don't know if he appealed to the associate warden.

Q. Are there any regulations that govern this appeal process to the associate warden?

A. I am not familiar with any.

Q. Anything in writing at all?

A. I am not sure. I haven't seen any.

Q. Mr. Apostol, on the Form 115 for the Clutchette hearing, in the lower left-hand corner there is a signature next to the word "approved." Do you know whose signature that is?

A. Yes, that's Mr. Park, associate warden of administration.

Q. Does that indicate, then, that Warden Park approved the action of the disciplinary committee here?

A. That's right.

Q. Mr. Apostol, maybe you can explain some of the other notations on the form. At the left of the first form, the "obeying order" charge, there are some no-

tations. I wonder—right in the middle of the form. I wonder if you could explain what they are.

A. Oh. That is the hearing officer. When the hearing officer first sees a man, if he's going to take action, he will fill the bottom part out. If he is going to refer them to the committee, then he will make a note, "refer to the disciplinary committee," and then sign his name.

Q. What does that notation say?

A. Says, "Referred to AC Disciplinary Committee. Cell status pending disciplinary hearing."

Q. What does that mean?

A. It means that the man, in his opinion, should remain within the cell and not have the liberty of moving outside.

Q. Do you know what cell he is referring to?

A. No, he doesn't say right there. It would be the cell that he's in at the time he saw the man.

Q. What are the notations on the next line?

A. That's the "maximum custody."

Then that's his name, Lieutenant Nelson, "Adjustment center lieutenant," and then it has the date over here.

Q. Lieutenant Nelson was the hearing officer?

A. That's right, yes.

Q. And then he also sat on the disciplinary committee, did he not?

A. That's right.

Q. Further down on the form, Mr. Apostol, there is a space marked "Offense" with the initial A and the initial D, and an initial M next to it. What is that for?

A. The three categories: A is for "Administrative," D is "Disturbance," and M is "Major." And it's a guideline for the hearing officer, so that it helps him a little bit on what might be referred to and what might not be referred to. As I say, the "Administrative" would be the minor type of offenses.

As we work up, the "Disturbance" might be something that might create a situation that might create a disturbance or violence. And then the "Major" type; as I said earlier, those are the ones that might be referred to the DA. The "Major" ones would be the ones that he would refer to the committee. The "Administrative" ones are the ones that he would hear. The "Disturbance" type, he'd have the choice of either hearing it or referring it to the committee.

Q. On this form for Clutchette, the M is checked. Does that mean it was considered a "Major" offense?

A. That's right.

Q. And who made that check?

A. This is the lieutenant in the captain's office that had a guideline of possible—of the offenses, and he reviews them all and he makes the check on there.

Q. Is that in writing?

A. Yes.

Q. Is that an institutional form?

A. Yes. Well, it's an institutional list, let's say.

Q. Do you have one of those in the courtroom today?

A. I do, yes.

Q. On the bottom of the form, Mr. Apostol, there's also a space entitled "Estimated Cost of Control."

What does that mean?

A. I have never used that, and I am not sure. The only other one is "Estimated Cost of Damage," and this would be damage to a cell. This I have never used.

Q. Do you know what it means?

A. No, I have no idea.

Q. What are the notations in handwriting at the very bottom of the form? There's a 272. What does that mean?

A. This would be the number of the offense for the—I think it's the month it occurred. An this would be—the next figure here would be the date that he appears before the Adult Authority, or if he had a parole date. And then the other figure here is the cell number where he is housed.

Q. The Adult Authority date is when?

A. Well, in here it says 12/70.

Q. Does that indicate that Clutchette will meet with the Adult Authority in December?

A. That's right.

Q. This month?

A. That's right.

Q. And do you know the purpose of his meeting with the Adult Authority then?

A. No, I don't.

Q. You don't know whether it's a regular Adult Authority hearing?

A. No, I don't know.

Q. Has he seen the Adult Authority with regard to his sentence or parole?

A. It might be.

Q. Is there any other reason he might be seeing the Adult Authority?

A. The only other reason might be if a man—well, if it had a parole date on there and the man had a disciplinary hearing, then that would have to be taken back to the Adult Authority and they would review it. Every disciplinary committee has to be taken to the Adult Authority. But the way that figure is there, looks like just a regular annual appearance, just the way the figure is on there: 12/70.

Q. Do you know of your own knowledge whether at the regular annual appearance the Adult Authority can fix sentence and grant parole?

A. That's the time that they do.

Q. Or not set sentence and not parole an inmate?

A. That's right, yes.

Q. Mr. Apostol, I would like you to describe for the Court just exactly what did happen at Clutchette's hearing.

A. The first thing, because it was a possible felony, we had to read his rights to him. There is a form that we have that—because we referred to the District Attorney—that we read and let him know what his rights are.

The Court: All right, now, may I inquire, you made reference a moment ago to an institutional list. Do you have the institutional list?

Mr. Stein: Yes, Your Honor.

The Court: All right, Court's Exhibit No. 3.

The Clerk: Court's Exhibit No. 3 introduced and filed in evidence.

[Document entitled "Institutional List was marked Court's Exhibit 3 for identification and received in evidence.]

The Court: Now, you made reference to a form that you read to him when you say you read his rights because of a possible reference to the District Attorney, is that correct?

The Witness: His rights, yes.

The Court: All right. Do you have that form?

Mr. Stein: Yes, Your Honor.

The Court: All right, Court's Exhibit No. 4.

The Clerk: Court's Exhibit No. 4 introduced and filed in evidence.

The Court: All right.

[Document outlining rights was marked Court's Exhibit 4 for indentification and received in evidence.]

The Witness: So far as procedure, the first thing we would do is to read him his rights and explain to him, because it's a possible felony, that it's going to be referred to the District Attorney, and he should know what his rights are.

And these are for the purpose of, you know, if the District Attorney then should want to prosecute, at least he knows what it is.

Mr. Turner: Q. Do you know whether the rights that are read to him are commonly referred to as Miranda rights?

A. Generally speaking, that's what is referred to.

Q. And then that was done in Clutchette's hearing?

A. Very first thing that we do, yes.

Q. Did you read them yourself?

A. Yes, I did.

Q. And then what happened?

A. Then he either signs it or doesn't sign it.

In his case, he signs and says he was willing to, you know, speak with us.

Q. He was willing to what?

A. To talk to us. Once we have done that, then I read the disciplinary offense to him so he knows what it is. Then I ask for his plea.

Q. What did you read to him in this case?

A. I read on the 115, what the charge was, and then I went in to some of the reports that the officers made, you know, explaining what occurred. So I read that to him.

Q. Did you read the reports to him?

A. Not—I don't say I read. . . . There was about eleven. I didn't read all eleven, you know. I referred to the ones on the offenses that were written by the officers that wrote the offense.

The Court: You say there were approximately eleven reports?

The Witness: Something like that.

The Court: Do you check off the reports that you read or initial them or otherwise identify them?

The Witness: No, I don't.

The Court: All right.

Mr. Turner: Q. Do you remember which reports you read in this case?

A. If I saw them, I probably—I'd have to review them.

Q. Did Mr. Clutchette say anything about wanting his lawyer there?

A. Well, I think when I read the reports, he mentioned that. Generally you find an inmate, when

you read the rights about the attorney, that they'd want an attorney there, and then you have to explain to them that——

[Laughter from body of the courtroom.]

The Court: Just a moment!

The question is, what did they do that time, not the practice, if you recall.

The Witness: You know, I am not sure. You know, if I were sure, I would say for sure.

The Court: Well, I understand your testimony to be that he did sign this waiver of right of counsel?

The Witness: That's right.

The Court: The form was actually signed by him?

The Witness: That's right, yes.

The Court: All right.

Mr. Turner: Q. Did he also mention whether he wanted his lawyer there at the hearing?

A. That is . . . . I don't recall.

Q. Did he say anything about wanting to call witnesses at the hearing?

A. He did say something about that, right.

Q. What was your reply?

A. Well, I explained to him that we can't have winesses in, you know, we can't have inmates and witnesses in at the hearing.

Q. Did you explain to him anything about having lawyers at the hearing?

A. If I did—and I am saying "if"—I explained to him that the lawyers would not be present, but if it was referred to the District Attorney, that's the time that the lawyers would be present.

Q. Did Mr. Clutchette request to see the Form 115?

A. I don't recall that.

Q. You don't recall one way or another?

A. Specifically, no, I don't.

Q. Did he ask to see any of the officers' reports?

A. Again, I don't remember. He may have, he may not. I am not sure.

Q. In any event, I believe your testimony was that inmates at the hearings are not allowed to see the reports, is that correct?

A. Not physically handle them, that's right, yes.

Q. Was he advised of the names of the officers who had filed reports?

A. I think it was, yes. The 115 was charged by—the 115, I think I read him the names of the officers that wrote the 115's.

Q. That's Officer Hahn?

A. That's right.

Q. On one charge, and Officer Fontana [phonetic spelling] on the other?

A. That's right, yes.

The Court: All right, let me inquire about that. As I understand it, was he given the names of—you say eleven reports, is that correct?

The Witness: I didn't give him the name of all of them. I remember that.

The Court: Did you request the name of all of them?

The Witness: I don't think he did.

The Court: All right.

Mr. Turner: Q. He did request to see the reports, though, didn't he?

A. I can't remember on that.

Q. Were there any interruptions at all in the hearing?

A. I don't think there were.

Q. How long did the hearing take?

A. I would say altogether about an hour.

He was present in there for about fifteen, twenty minutes, and then we took the remaining time discussing the case and coming to a decision.

Q. Were there any phone calls made during the time you were deliberating?

A. When we were—after he left, yes.

Q. Who did you make phone calls to?

A. I phoned to Mr. Park.

Q. And what was the substance of that conversation?

A. Well, we had come to the decision of what we felt should be done as far as disposition, but I wanted to make sure that physically what we had come to could be done, and I just wanted to know if we could do this. This is all I wanted to know.

Q. What was the problem?

A. Oh, it was with the visiting room. Because it was involved in the visiting room, and there was a—when an offense occurs in the visiting room, then you have to evaluate the visitor and did the visitor get involved, and do you have to have any restrictions there. Well, our feeling here was the visitor was not involved whatsoever. We saw no reason to not allow

him to visit with any of his visitors. But the point would be then, where physically could he visit with his people coming in? We couldn't let him go back out, couldn't go back to the visiting room where other people were involved. There are two rooms where you have or could have single visits there, so the question I had to Mr. Park was, we would like to let him continue visits, but can we have him visit in this area here where there's single visiting.

And he said it could be done.

Q. Is that all you discussed with Mr. Park?

A. That's what I wanted to know, right.

Q. Did you discuss the other punishments that you imposed?

A. No.

Q. Did you talk with anyone else beside Mr. Park who was not in the hearing room?

A. No, that was all.

Q. Just Mr. Park?

A. Yes. Because I wanted that information.

Q. Do you know how long you were on the phone with him?

A. Oh, I don't know.

Q. Was there any notation made on the record at the hearing about that conversation?

A. No.

Q. What punishment did you impose on Clutchette?

A. Well, there was—referred to the District Attorney, 29 days isolation, 29 days cell status and a 60 days loss of privilege. I don't recall, I think those are generally what they were.

Q. What does the 29 days cell status mean?

A. Well, when a person is on isolation, he is entitled to leave the cell for a period of the day, to walk out in a little passageway there, so they can move up and down. If there is an offense of an assault or something, where we feel that the man should not be out, then you can place him on cell status for a period of time.

That's what cell status means, he doesn't—he stays within the cell and doesn't have the privilege of, say, walking in that passageway.

Q. And the 29-day cell status runs at the same time as the isolation?

A. That's right, yes; concurrent.

Q. In other words, he is to stay in his cell for 29 days?

A. That's right.

Q. After that 29 days, where does he go?

A. He goes back to his original cell, original housing.

The Court: Let me see if I understand this. There were two offenses?

The Witness: That's right.

The Court: And the disposition of the first offense, which would be the first document of Court's Exhibit, I think, No. 1—is that right?

Mr. Turner: That's right, Your Honor.

The Court: All right. You have a disposition of seven days isolation to start 11/14/70, is that correct?

The Witness: That's right.

The Court: And the second disposition was twenty days isolation, plus twenty days cell status, CC, with Charge 1, plus 60 days loss of privilege to start 11/14.

The Witness: That's right.

The Court: Now, what does "CC" mean there?

A. Well, it means that the cell status and the isolation would run together. If you didn't say that, what might happen is, you might get 29 days isolation and then give the man 29 days of cell status.

The Court: All right, so the plus was modified by "CC"?

The Witness: Yes.

The Court: Which meant for your purposes "concurrent"?

The Witness: Concurrent, right.

The Court: All right.

Mr. Turner: Q. The sentence on the first charge was, in effect, time served, wasn't it?

A. That's right. Generally what we do is, because the committee doesn't meet sometime within two to seven days after the man has been in the isolated area, we give them credit for the time he's been there. And this is the general practice, to give them the time served.

Q. Are you required to do that?

A. No, you are not required to, but generally we do this.

Q. So on the first charge, disobeying orders charge, he was sentenced to seven days in isolation but given time served?

A. Right.

Q. And on the second charge, assaulting an officer, he received 29 days in isolation with cell status?

A. M-hm.

Q. Plus 60 days loss of privileges?

A. Right.

Q. Plus referral to the District Attorney?

A. Right.

Q. How do you go about referring the case to the District Attorney?

A. Well, anything that would appear to be a felony, which would be assault, arson, it's required that we do. The Marin County District Attorney will make the final decision whether he will prosecute or not. It's not up to us to make that decision. But anything that might appear to be a felony, we should.

Q. What do you send to the District Attorney?

A. The complete information that we had on it, when we hear the case.

Q. Have you sent it for Clutchette?

A. I don't know, because I don't handle that part.

Q. Who handles that?

A. There's an employee at San Quentin that works with the District Attorney and handles the case. That's Mr. Henkins [phonetic spelling].

Q. Do you know in Clutchette's case what documents will be sent to the District Attorney?

A. I would say everything that we had would be sent to him.

Q. That includes the 115?

A. That's right.

Q. And the reports?

A. That's right.

Q. Anything else?

A. That would be it.

The Court: Now, may I inquire, you provided for seven days isolation and 29 days isolation?

The Witness: Right.

The Court: Now, that term "isolation" has a very specific meaning to you?

The Witness: M-hm.

The Court: Just exactly what does it mean?

The Witness: Well, it means during the period of time that he is in isolation, there are some restrictions. For a person that's in the adjustment center, there's very little difference, because he's restricted from moving in the institution. So there's no institution movement. But——

The Court: Well, let's start with the meaning. "Isolation" means confinement in a particular cell, does it, or a particular type cell?

The Witness: Area, yes—area.

The Court: Particular area.

The Witness: Right.

The Court: And the cells in that area are identical in character?

The Witness: That's right.

The Court: Or reasonably so?

The Witness: Right, yes.

The Court: So he is assigned to the particular area in a cell?

The Witness: Right.

The Court: Now, isolation means that confinement in the cell itself, does it, except for certain limited periods?

The Witness: He would stay there unless . . . Now, if he didn't have cell status, he would get out to, as I

say, once a day to exercise for a period of time. That's isolation.

The Court: Well now, 29 days isolation meant no cell status?

The Witness: If you say just "isolation," it's a separate kind of a thing.

The Court: Well, I am rather curious about your phraseology. You say 29 days isolation, plus 29 days cell status concurrent. Does that mean that he thereby —the isolation became cell status?

The Witness: To a degree, yes. In other words, he'd have to stay in the cell. But it doesn't—isolation doesn't restrict visits.

The Court: I understand, but isolation then in this case—I am getting at it one at a time—did mean confinement to his cell except for the limited period you have indicated.

The Witness: Right, yes.

The Court: All right. I clarified that, so go ahead.

Mr. Turner: Thank you, Your Honor.

Q. Are there any rules or regulations governing what conditions do exist in isolation?

A. There are, yes.

Q. At San Quentin?

A. Yes.

Q. Are they written down?

A. They are, yes.

Q. On some institutional form?

A. Right.

Q. Do you have a copy of that in the courtroom?

A. I don't think I have with me, no.

Q. Do you know what that form is called?

A. No. It's not a form, now, you know—it's not just a form. It would be in the manual for running the Adjustment Center.

Q. And does that manual specify what privileges——

A. That's right.

Q. ——any inmates in isolation are allowed to have?

A. Right.

Q. An what the furnishings of the cell are supposed to be?

A. That's right.

Q. Are there any regulations or any standards or guidelines at all governing who you put in isolation or what for?

A. I would say the inmate plan of—I think the inmate plan would have that. When the committee meets, if gives you certain things that a committee can do. I don't know if I can pinpoint exactly wherein that says, you know, for these kinds of offenses you should or shouldn't. I think anything that comes under any of the major offenses, you can give isolation.

Q. Is that what the inmate plan says?

A. I don't recall exactly.

Q. Is there any more serious punishment than a disciplinary can mete out than isolation?

A. No, I think that's the most serious.

The only other one that they have, if the man has a parole date, we have to make a recommendation to the Adult Authority on whether we feel that he should keep his date or shouldn't keep his date. And I think that might be, you might say, a more serious

kind of action that can be taken than isolation. That's only when a man has a parole date that we can make that recommendation.

Q. If he doesn't have a parole date, you don't make a recommendation?

A. No, no.

Q. But you do—you are required to report the disciplinary action to the Adult Authority, aren't you?

A. Well, if he has got a parole date every year that he goes up, the discipline actions are a part of the documentation that they review.

Q. How many men are in isolation at San Quentin now, today?

A. I would say—and I am just guessing, because I haven't been there for a week—ten to fifteen, something like that.

Q. And they are all there because of action of the disciplinary committee?

A. That's right.

Q. In Clutchette's case, in taking away privileges for sixty days, what privileges were those?

A. Well, here again, a man that's in the Adjustment Center doesn't have the same privileges that, say, a man in the main line might have. But that would mean that he couldn't draw canteen. This is the main thing.

Privileges—the only privilege you take away would be a man that would go to the movie, go in to the gymnasium, and drawing canteen. So in his case, the only thing would be just drawing canteen.

Q. In Clutchette's case?

A. That's all, yes.

Q. That's the only privilege he lost?

A. That's all, yes.

The Court: May I inquire in that connection, does he lose any good time credits?

The Witness: No, no such thing.

The Court: All right.

Mr. Turner: I'd like to explore in detail, if Your Honor please, the precise conditions that prevail in isolation. For instance, how big are the cells.

The Court: All right, then, in that event, we will take a short recess at this time.

[Recess.]

The Court: Counsel, I'd like to make a preliminary observation, if I may. While there may be no occasion to invoke the provisions of Rule 5(a), I deem it advisable at this time for the Court to read the substance of the rule.

"Subject to Subsection (c), which is not particularly relevant at the moment, and pursuant to the recommendations and resolution of the Judicial Conference of the United States, adopted on March 8, 1962, the taking of photographs in any form and the broadcasting or recording for broadcasting by radio, television or other means, in or from the courtroom or its environs, in connection with any Federal judicial proceeding, are hereby prohibited, whether the Court is actually in session or not."

I make this observation not because I feel that there is necessarily any need therefor, but should anyone have any recording device that they hope to use for any such purposes, they are requested at this time to remove the same from the courtroom.

All right, Counsel, you may proceed.

Mr. Turner: Thank you, Your Honor.

Q. Mr. Apostol, I'd like to direct your attention to the conditions of life in isolation. First, how big are the cells in isolation?

A. Regular isolation? I don't have numbers.

Q. Approximately what by what?

A. Five feet wide—nine, ten feet long. Something like that. The regulation size, like any other cell.

Q. Like any other cell where? At San Quentin?

A. That's right.

Q. You mean they are neither bigger nor smaller than other cells in the Adjustment Center?

A. The same size.

Q. And in the general population?

A. The Adjustment Center cells might be a little bigger than those in the general population. It's a newer building, newer facility.

Q. What is the cell made of? Is it steel or concrete or what is it?

A. Concrete walls.

Q. Floor also?

A. Yes.

Q. Ceiling?

A. Ceiling is. Same as the other cells. It's got the bar doors, you know, that you'd have in normal cells.

Q. Any windows?

A. The front of the cell is a window, you might say.

Q. Back of the cell is solid?

A. There is one opening, you know—there's an alley in the back that has an opening, that's all.

Q. Can the inmates see out of that?

A. No, it's closed all the time. There's nothing to see anyway.

Q. What are the furnishings in the cell?

A. The cell has its bed, has the toilet facilities and the washbasin, and basically that's it.

Q. What type of bed is used?

A. In isolation it's the regular bed that we have. The only thing that we have done, we have recently, instead of the spring on there, we have put a metal plate on there. And that was done because there was an incident where they took the—you can take the spring apart, and there was an assault with an employee that was stabbed with a spring.

So general practice now is to put kind of a metal plate on top so that they can't be taken apart and used as a weapon.

Q. Instead of a spring?

A. That's right, yes.

Q. Does the inmate sleep on the metal plate?

A. Well, there's a mattress. You have your mattress in there, too.

The Court: I assume this bed is cot size?

The Witness: Yes, that's right. It's really a cot, is what it is.

Mr. Turner: Q. How thick is the mattress?

A. It's the regular mattress, you know [indicating].

Q. You say there's a toilet in the cell?

A. That's right.

Q. And washbasin?

A. That's right.

Q. Is there hot water?

A. There is, yes.

Q. Hot and cold water?

A. That's right.

Q. Does an inmate have sheets?

A. Sheets. That's right, he has the normal sheets and the blankets that you have. And you have your facilities, toilet facilities for shaving and toothpaste, eyeglasses if you have them, things like that.

Q. What kind of lighting is there in the cell?

A. It's the same as you have in any other cell. It's, you know, one light on the ceiling. It's kind of a—something like this, behind a reflector.

Q. Fluorescent light?

A. I don't know if it's a bulb or fluorescent, but it's behind glass.

The Court: Indirect light, then?

The Witness: That's right, yes.

The Court: All right.

The Witness: But it's the same light as you have in any other cell. There's no difference.

Mr. Turner: Q. Does the inmate control the light, turn it on and off?

A. No, the light is turned on in the morning and turned off in the evening.

Q. What time?

A. I can't say exactly in the Adjustment Center, but in most of the units it's about 12:30 in the evening.

The Court: Is that simultaneously, in all cells?

The Witness: That's right, yes.

The Court: Is this done by an electronic clock?

The Witness: No, it's an employee does this.

The Court: An employee. All right.

The Witness: But I would say it varies in the institution where the man might live. In some of the other units, it's left on all night. This would be in the honor units. The unit where a man first comes in, then it's turned off at 12:30 in the evening.

Q. Well, in the honor units, the inmate can turn the light off, can't he?

A. That's right. But then, also, he can turn the light off in the main line unit, too. There's a little switch on there.

Q. Well, in isolation he can't turn the light off, can he?

A. I don't think so.

Q. It stays on until whenever the employee wants to turn it off?

A. Right, yes.

Q. What does the diet of inmates in isolation—is it any different from inmates in the general population?

A. The only difference is that they don't get the dessert. They eat the same thing as anybody else does, but they don't get dessert.

The Court: Beg pardon? No dessert?

The Witness: That's all the difference.

Mr. Turner: Q. Is that what is meant by "restricted diet"?

A. No, restricted diet is what they call—it's kind of a meat loaf with 2400 calories, where a person generally—and you do this if he is, say, not eating the food. Or sometimes they throw the food away or de-

stroy it or something like that. Then you might take action of having a restricted diet. But isolation is not restricted diet, no.

Q. Who makes the decision whether an inmate in isolation should be on restricted diet?

A. It's the committee's action.

Q. Disciplinary committee?

A. Right.

Q. This is a disciplinary action?

A. That's right.

Q. What clothes are worn by inmates in isolation?

A. They are wearing the regular clothes.

Q. Regular institutional clothing?

A. That's right, yes.

Q. They have shoes?

A. That's right.

Q. Shoe laces?

A. Right.

Q. Belt?

A. Yes, same thing.

Q. Are inmates in isolation allowed to shower?

A. Regular showers, right. They shower the same as the other men do.

Q. How often is that?

A. It's twice a week.

Q. Is that true also of inmates on cell status?

A. Oh, sure.

Q. Is it fair to say that if an inmate is on cell status, the only time he leaves the cell is for showering purposes, and if he has a visit?

A. Or if he had a board appearance. If that occurred, that would be a time, too, yes.

Q. He is not released from the cell for any recreation?

A. No. That's the purpose of cell status.

Q. What's the purpose of cell status?

A. That he doesn't leave the cell?

Q. If the inmate is in isolation but not on cell status, is he let out for recreation?

A. Yes.

Q. How long is he out?

A. Approximately once a day for an hour.

Q. And where is he allowed to go?

A. There's a passageway in front of the cells that might be a distance of, say, fifteen cells long, and he'd have the freedom to move in that area there.

Q. For an hour?

A. That's right.

The Court: That would be approximately 75 feet?

The Witness: Could be, yes.

Mr. Turner: Is there any opportunity to get out in the fresh air?

A. Not when you are on cell status.

The Court: Might be more dangerous today.

The Witness: Not while on cell status. On isolation, yes, but not on cell status.

Mr. Turner: Q. You mean they get out of doors if they are in isolation?

A. Yes, sure.

Q. In recreation period?

A. Yes, sure.

Q. It's not out of doors right in front of the fifteen cells?

A. No, not—that isn't, no. But we have a yard.

Q. How often do they get out there?

A. Once a day.

Q. Once a day?

A. Yes, approximately. Approximately an hour, say.

Q. And that's the same hour as you mentioned before, where inmates are let out in front of the cell?

A. Right.

The Court: Who has the privilege of going out in the yard—yard privilege once a day—that you are talking about?

The Witness: The people that are in the Adjustment Center, or the people that are in the segregated area. They are allowed that.

The Court: What I mean, if he is on isolation, is he allowed out?

The Witness: Sure.

The Court: All right, go ahead.

Mr. Turner: Q. For inmates who are going out to the yard, are they searched?

A. They are, yes.

Q. Is that a strip search?

A. Right, yes.

Q. With a rectal examination?

A. Yes.

Q. That's a condition of getting out of the yard, isn't it?

A. Yes.

Q. Are inmates in isolation allowed to have a comb?

A. Yes.

Q. Toothbrush?

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A. Right.

Q. Eyeglasses?

A. Right.

Q. The conditions of isolation are the same for everybody in isolation, aren't they?

A. They are, yes.

Q. Some inmates don't have more or less furnishings, for example?

A. No.

Q. Concerning the privileges that an inmate can have in isolation, is he allowed to correspond?

A. Yes, there's no discontinuation of visiting or mail. He can continue corresponding, right.

Q. Where does he eat his meals?

A. In the cell.

Q. In his own cell?

A. That's right.

Q. How does the food get to him?

A. It's brought in hot—hot trays. I mean, hot containers, and they are served on the tray.

Q. Does he have any contact with other inmates while he is in isolation?

A. Only that he can speak to the men that are in the same side in the cells, because the doors are, you know—there are just bars and they can communicate.

Q. They can't see each other?

A. No, they can't. Or let me say this—another man that might be walking in his period of exercise could, you know, pass by and talk to them.

Q. You don't let all the inmates out for exercise at the same time, I take it?

A. Those that go in front of the cell, only one at a time. Those that go in the yard, they go out as a group.

Q. What reading material are isolation inmates allowed to have?

A. At that period of time they are allowed, I know, religious material and legal work, legal material.

Q. Are they allowed to have newspapers?

A. I think they are restricted on any other reading material at that time.

Q. Magazines?

A. In mail they only allow first class mail. The second class mail is restricted or retained until after he gets out of isolation. Then he is given that.

Q. What about access to the prison library?

A. Well, legal material, yes. But not just reading material, not books or novels or anything like that. He has to wait until he is off isolation.

Q. So basically the only reading material he has access to is legal material?

A. That's right. And religious, if he wants.

Q. Are inmates in isolation allowed to view television?

A. No.

Q. Do they have radios?

A. No.

Q. Inmates in the Adjustment Center have radios?

A. Ear plugs, right; they don't have radios, it's a plug-in.

Q. Are isolation inmates allowed to go to movies at the prison?

A. No, they are not.

Q. Are inmates in the Adjustment Center allowed to go to movies?

A. No, they are not.

Q. Just the general population?

A. That's right, yes.

Q. Isolation inmates are allowed to go to the canteen to make purchases, is that your testimony?

A. No, let me say this.

Q. I may be misstating what you said before.

A. No, they can't have canteen items. That's retained until after they are off isolation.

Q. All their personal property is taken away?

A. Right. Until they are off isolation. But they are given the general items, as far as combs and toothbrushes and things like that—shaving material.

Q. Are they allowed to smoke?

A. They are not supposed to, let me say that.

Q. Beg pardon?

A. No.

Q. I take it you have observed the isolation cells and been on that wing?

A. Right.

Q. How do inmates in isolation spend their time?

A. That's—there's not too much for them to do, as far as passing the time.

Q. Is there any opportunity to work or to participate in the vocational training program?

A. Not at that time, no.

Q. Is there any opportunity to go to the prison school or participate in the education program?

A. Not at that time, no.

Q. Are inmates allowed, isolation inmates allowed to go to corporate religious services?

A. No, there is no movement from there.

Q. How are their religious needs attended to?

A. The chaplain would come to them, and he has.

Q. You mean he goes to their cell?

A. That's right, yes.

Q. Are inmates in isolation seen by a psychologist or psychiatrist or counsellor before they are put into isolation?

A. They are seen by somebody in the medical department.

Q. But before they are put into isolation?

A. That's right. And then every day they are seen by somebody in the medical department.

Q. Is that true even when an inmate is put in isolation before the disciplinary hearing?

A. Yes.

Q. And in Clutchette's case?

A. Preliminary hearing, sure.

Q. How do inmates in isolation receive medical care if they happen to need it?

A. Daily, somebody from the medical department comes over to the——

Q. Is that a doctor?

A. No, it's a medical technician—assistant, right. And then he refers any serious cases to the doctor, and then the doctor comes over.

But there's somebody that daily sees them in there.

Q. You mentioned that Adjustment Center inmates

were allowed out to the yard for recreation. Are all Adjustment Center inmates allowed out to the yard?

A. Not all of them, no. It's after they have been there a period of time, and then those that have been there for a time would be allowed to go out. Most of them do, let's say that. The majority of them.

Q. But there are some who are not permitted to go out?

A. Right, and then they are restricted into the area in front of their cells.

Q. Clutchette is one who is not permitted to go out?

A. That's right, at this time, yes.

The Court: When you say not permitted to go out to the recreation area, are you referring only to persons who have been disciplined?

The Witness: Or new people coming in the institution, too. These might be people that are transferred.

The Court: What are the rules for the new people in the institution?

The Witness: For a new person coming in, he would go to what we call our committee, and then the committee would review it and determine what program he would be involved in, if any. And from there, then he would be assigned to the yard.

The Court: What is the determining factor as to whether you go into the Adjustment Center?

The Witness: Into the Adjustment Center?

The Court: Yes. What do you mean by that?

Does that mean a prisoner newly sentenced?

The Witness: No, this would be somebody that was in the institution that has committed some kind

of assaultive kind of action. That would be the person we place in the Adjustment Center. When I say transfer, he would be transferred from another adjustment center to our Adjustment Center. That's what I mean.

The Court: All right.

Mr. Turner: Q. One of the possible dispositions that the disciplinary committee can make is recommendation for a change in custody status, is that right?

A. That's right.

Q. And then an inmate could go from population to the Adjustment Center?

A. Yes.

Q. Is there any limit on the amount of time that an inmate might spend in the Adjustment Center?

A. There is no set time on that. It depends on the inmate and the circumstances.

Q. It could be the duration of his sentence, couldn't it?

A. Might be.

Q. In Clutchette's case, the disciplinary committee made a finding of guilty as to both charges, is that correct?

A. That's right.

Q. The charge of disobeying an officer, an order, is not normally a matter for the disciplinary committee, is it?

A. It could or couldn't. It depends.

Q. Well, according to the list of infractions which is Exhibit 3, disobeying orders falls under the category of "Administrative" infractions. Normally those

kinds of infractions don't go to the disciplinary committee?

A. Normally. But if it should be one that could be more serious, or determined to be more serious, the hearing officer can refer it.

Q. In Clutchette's case, this was referred to the committee?

A. That's right. He has the privilege to do that.

Q. When there is an administrative infraction charged and the hearing officer determines it, does the record of that charge go to the Adult Authority?

A. Nothing goes to the Adult Authority until the committee—until the final adjudication, whether it's the committee or the hearing officer.

Q. Well, what I am getting at is, when there is a final adjudication of an administrative infraction——

A. That does.

Q. —is that——

A. That's right, any kind of a disciplinary action goes before the Adult Authority?

Q. Thus if the inmate is found guilty of being disrespectful or out of bounds, or any of these other infractions——

A. That's right.

Q. —that goes before the Adult Authority?

A. That's right, all of them—all of them.

Q. Is the procedure with the hearing officer any different from the procedure at the disciplinary committee?

A. No.

Q. With regard to Clutchette's case, was there a report by Warden Park which formed part of the disciplinary record?

A. I think one of the reports was written by him, right.

Q. And then I believe you testified that Warden Park also reviewed the action of the disciplinary committee?

A. Gave final approval on it, right.

Q. Is it the normal procedure——

The Court: May I ask you, you say there was a report from——?

The Witness: It's a supplemental report, right.

The Court: Is that a report that was included among those attached to the Form 115?

The Witness: I think so. I am not sure.

Mr. Turner: Q. Is it the normal procedure in a disciplinary matter to have reports from officers supplementing the 115?

A. Yes. You like to get as much information as you can. Anybody that's been present when there is an incident, or whatever occurs, you ask for them to make supplement reports. You get the initial report by the officer that writes the disciplinary action, you get his report, and then any other person that, you know. . . .

Q. Who gets his report?

A. Pardon?

Q. Who gets the initial report?

A. All reports go initially to the captain. It's directed to the captain.

Q. And then is it up to the captain to decide whether to get additional reports?

A. He could if he wanted to.

Q. Who makes that decision normally?

A. It would be—it depends on the area where it occurred and whoever was initially responsible for, say, completing the complete investigation. It would be up to him to do this.

Q. Is there any regulation or anything that requires it?

A. It would be the senior person present at the time.

Q. But there's nothing in writing that requires it?

A. There's something that mentions this.

Q. Where is that?

A. I can't say exactly. It might be in the inmate's rule plan.

Q. In the course of an ordinary session, average disciplinary session, where you hear seven to ten cases each time, on the average are there reports to supplement the 115?

A. It depends on to what extent it is. If it is, you know—if it's not a very serious kind of an offense, you might not have too many. You might have one. You might not have any in some cases, if it could be——

Q. In some case you just have the 115?

A. Yes, if it can be written in one paragraph and explain what happened, that's sufficient, you know.

Q. Would you say that in more cases than not, that is the situation?

A. I would say that in those of the major offense, you will probably get a supplement, because that takes a little more description, a little more information. Those that are the administrative type, they are basically right on the 115.

Q. Is there anything in the director's rules or in any other department regulations that would prohibit you in disciplinary proceedings from having an attorney present to represent the prisoner?

A. I don't know if that's in writing.

Q. Is there anything in any director's rules or regulations that would prohibit you from allowing the prisoner to call witnesses?

A. I haven't seen that in writing. I haven't seen that myself.

Mr. Turner: May I have just a moment, Your Honor?

The Court: Yes.

Mr. Turner: Q. Mr. Apostol, do they ever at disciplinary proceedings write up a report of what the prisoner said in his own defense?

A. Not in detail. Generally like in the 115, we will talk about the findings, there will be a statement of what he may say in there. But not in great detail.

Q. About what proportion of cases do you make a finding of not guilty?

A. There might be roughly between ten to fifteen percent, maybe twenty. Something in there.

Q. Is that also true of major offenses?

A. They would probably be less in a major offense than, probably, in the administrative type. I would say you find more not guilty in the administrative type than the majors. But that's my guess on that.

Q. In the major offenses, do you think you may get more guilty findings than in the minor offenses?

A. I am just taking a guess on that.

Q. I think we ought to clear up, Mr. Apostol, just exactly what the difference is between the Adjustment Center and the general population. How do the conditions of life in the Adjustment Center differ from those that prisoners in population have?

A. Well, the main thing is that it restricts the movement within the general population of the main line. As I said earlier, if the type of person that might be assaultive, that, because he shouldn't be in the general population, might be a danger to the other inmates or to the institution—that they are restricted in motion or movement. That's the main thing. It's like housing within an institution, is what I mean.

The Court: All right, but does he otherwise enjoy the same exercise privileges?

The Witness: Well, as I say, he's only allowed that one—one hour.

The Court: He has a different area?

The Witness: Right. He has a different . . . .

The Court: He is otherwise allowed, let's say, recreational privileges?

The Witness: In the area that he is. He can't——

The Court: That includes movies, TV, radio?

The Witness: No, they don't have television in the Adjustment Center. They don't have movies in there.

The Court: But they do in the main line?

The Witness: That's right, yes.

The Court: What other differences in recreation privileges are there?

The Witness: Well, the——

The Court: All right, does he have the same accessability to the library?

The Witness: He can get—he doesn't go to the library, but he can get books from the library.

We have a library in the Adjustment Center, so he can select books from the library. So he does have a library in the Adjustment Center.

The Court: All right. If you are in the main line, you can go directly to the library?

The Witness: That's right, yes.

The Court: Now,—and the mailing privileges are the same as the main line?

The Witness: The same, that's right.

The Court: All right, go ahead.

The Witness: Not—not every man in the main line has television either. It's only those men that are in the honor unit. A new man that comes in to, say, the initial housing, the main line initial housing unit, doesn't have television. After they have been there for a while, then he gets to the honor unit, then they have television.

The Court: All right.

Mr. Turner: Q. Inmates in the main line aren't restricted to one hour of recreation, are they?

A. No, in the evenings and weekends.

Q. They don't have to submit to any search before they go to the yard, do they?

A. No.

Q. Inmates in the Adjustment Center are not allowed to work or participate in the vocational program, are they?

A. Educational?

Q. Vocational.

A. No, educational, that we have. In other words, we have a teacher that goes in the education program, into the Adjustment Center in the evenings twice a week, and he provides them with whatever education programs they want. It would be cell status, and he will—or correspondence course. But he will spend time with them and they can progress and graduate and pass high school if they wanted to.

Q. But they don't go to school with——

A. No, the teacher comes to them and provides them with what educational program they want.

Q. In the general population, the inmates go to school?

A. That's right, yes.

Q. And they also go to work in the general population?

A. That's right, yes.

Q. But they can't in the Adjustment Center?

A. That's right.

The Court: So he has no work privileges, is that correct?

The Witness: There's no work program for them, other than the few men that might be working in the Adjustment Centers. Two or three of them there that help in serving and then in cleaning the institution.

The Court: Well, that's part of their work because they are members, because they are in the main line or——?

The Witness: No, we use men within the Adjustment Center for the work in the Adjustment Centers.

The Court: All right.

Mr. Turner: Q. Do you use what is called a strip cell at San Quentin?

A. We have two in there, that's right.

Q. What are they?

A. Well, it's two cells. Now, the difference there is that we don't have facility for—the regular toilet and washbasin. That's what they don't have.

Q. They don't have a toilet?

A. Yes. And the reason for that is that they can destroy these in the main line or in the regular cell. And when a person does destroy it, that's the time they would use that.

Q. Who determines whether to put an inmate in the strip cell?

A. That would be the committee. Initially it might be—you'd have to have action immediately, and it might be the officer in charge of the Adjustment Center, would do that. And then that would be confirmed by the committee.

Q. By the disciplinary committtee?

A. That's right, yes.

The Court: This would involve someone who is what? Engaged in destructive practices as far as——

The Witness: Yes, as far as——

The Court: Are you familiar with Duval?

The Witness: No.

The Court: The name doesn't mean anything to you?

The Witness: No.

The Court: All right.

[Colloquy between Court and clerk out of hearing of the reporter.]

Mr. Turner: Q. Do you use what are called quiet cells at San Quentin?

A. We have them there, right.

Q. What are they?

A. They are the same as any other cell, except that there is a door on the front.

Q. Solid door?

A. It's got a window on it, you know, but it's a solid door. And that's usually, generally, for assaultive-type inmates that would throw things.

Q. Where are those cells located?

A. They are in the Adjustment Center.

Q. Where are the strip cells located?

A. They are in the Adjustment Center too.

The Court: "Quiet cell" merely means a change in the character of the isolation cell?

The Witness: The door, that's right. Or any cell, right.

The Court: All right.

Mr. Turner: Q. Are there furnishings in the quiet cell?

A. Yes.

Q. Bed and washbasin?

A. Yes, sure.

Q. In the strip cell there is nothing?

A. No. Well, they—they have what they call the oriental toilet facility, and then you have to provide the water for them. But that's because they, you know—destruction of the plumbing.

Q. It's just a hole in the floor?

A. That's right.

Q. Is that the only thing in the room?

A. Plus the bed.

Q. There is a bed in a strip cell?

A. Yes.

Q. With a mattress?

A. Yes.

Q. And the decision whether to send a man to a strip cell, you say, is ordinarily the decision of the disciplinary committee?

A. Right.

The Court: Getting back to this question of the bed in an isolation cell, would you describe to us the type where you had a steel—what is it, a steel plate?

The Witness: Right.

The Court: With the mattress. Do you also have concrete ones?

The Witness: In the quiet cells. They have them there. That's, you know, to eliminate destruction of beds.

The Court: What does that mean, concrete?

The Witness: Kind of a—it's about fifteen feet [sic] off the floor, and it's a regular sized bed. But it's made of concrete. Doesn't have any give, because it has no spring.

The Court: And the mattress is put on top of that?

The Witness: That's right, yes.

The Court: All right.

Mr. Turner: May it please the Court, Mr. Silliman, who is Mr. Clutchette's attorney, would ask permission at this time to conclude the examination of this witness.

The Court: Well, I don't usually permit two counsel to examine, particularly when they are able. But you may do so.

Mr. Turner: Thank you, Your Honor.

Mr. Silliman: Thank you, Your Honor.

Direct [Additional] Examination

By Mr. Silliman:

Q. Mr. Apostol, are you acquainted——

The Court: I am only putting one condition on you: That you don't replough any of the same ground.

Mr. Silliman: I understand that.

The Court: All right.

Mr. Silliman: Q. Are you personally acquainted with Mr. Clutchette?

A. I am not sure what you mean by "personally acquainted."

Q. Had you ever seen him before the date on which you acted as a hearing officer at the disciplinary committee?

A. I probably have, but, you know, I have had no long conversations or anything with him. I have probably seen him pass by.

Q. Okay. And are you the program administrator for the Adjustment Center?

A. Right. The Adjustment Center includes other areas. I mean, the program administrator includes other areas. There's another area of the institution.

Q. What area is that?

A. That's what they call the Southwest Unit. It's A and B section in the institution.

Q. Okay, and is the B section included in the term "main line" or "general population"?

A. No, that isn't.

Q. That's another problem inmate area or something of that kind?

A. That's right, yes.

Q. Now, are you aware how Mr. Clutchette came to be in the Adjustment Center at San Quentin?

A. He came from another institution where he was in the Adjustment Center, and then he transferred to our institution.

The Court: Is that routine practice?

The Witness: That's right, yes, when you transfer a man from one adjustment center to another one, he goes to the other adjustment center.

Mr. Silliman: Q. Do you know what caused him to be housed in the Adjustment Center at the other institution?

A. I have a general idea; not specific, though.

Q. What was your general idea?

A. Well, there was some offense down at Soledad that he committed or either he has been alleged to commit, and that's why he was placed in the Adjustment Center down there.

Q. And so he is being kept on Adjustment Center status as punishment for some offense at Soledad?

A. Let's say it's a continued housing that he was down there. It's just the housing we are talking about.

Q. Okay, but along with the housing is attendant all of these differences in adjustment center life, as opposed to main line life?

A. That's right, yes.

Q. And at least with regard to Mr. Clutchette, that's the additional condition that he's not allowed outside exercise, is that true?

A. At this time.

Q. How long has he been in the Adjustment Center at San Quentin?

A. I would say about five months he has been in there.

Q. Okay, and so during the five months that he has been in the Adjustment Center, he has not been outside for the purpose of recreation, is that correct?

A. No, it's been internally, right.

Q. Okay. Now, the strip cells and the quiet cells are different than the isolation cells, is that right?

A. The quiet cell and the isolation cell is similar except for the bed. The quiet cell has this concrete in there and the isolation cell has the bed with the metal on it. But otherwise the quiet cell and the isolation cell are similar. Except, as I say, for the door out in front; that's all.

Q. And the door then would cut off whatever opening there was into the cell and make it like, somewhat like a large closet?

A. If you close the door. But we don't close the door.

Q. In which?

A. In the quiet cell. We don't close the door. If you had an inmate that was causing a disturbance and there was a lot of noise, you would close the door. But there's no need for us to close the door in the cases we

have had. Since I have been there, we haven't closed the door. We leave the door open.

Q. Well then, there's no difference between a quiet cell and an isolation cell?

A. Not generally. Just the bed, is the main thing. Plus, if you look at it, instead of havng the cell stop with the bars, it has a kind of continuation, and half of it in front is like a partition with a window. And then you have the door, see, and that's all it is. And the main thing you would have that is, basically, you know, if somebody were to throw something at you, you would place somebody in there. That's the main thing.

Q. Okay. Now, are you aware that Mr. Clutchette has spent some time in a strip cell by way of punishment for this infraction?

A. When was this, now? For this infraction?

Q. Yes.

A. No, he was in no strip cell.

Q. At no time?

A. No.

Q. Was he ever in a quiet cell?

A. Yes.

Q. And for how long was he there?

A. I think he was there for—oh, about either two or three days. Something like that.

Q. And the quiet cell has a different type of bed also, doesn't it?

A. That's the one that has the concrete, right.

Q. Concrete slab?

A. Right.

Q. And there is a mattress placed on the concrete slab?

A. That's right.

Q. Is there any difference in the mattress as used in the quiet cell as opposed to the mattress used in the ordinary adjustment center cell?

A. They have what they call a mattress that's—oh, it's a little different, because it's fireproof, and they use that in the quiet cell.

Q. Well, among the differences, other than its inflammability characteristics, it's approximately one inch thick?

A. It's not as thick as the other one, that's right, yes.

Q. About one inch?

A. Approximately. Something like that.

Q. Something like a tumbling mat, isn't it

A. Yes.

Q. Are pillows provided to the inmates?

A. Yes.

Q. Okay. And do you know at which point during the continuum of the time you describe with relation to Mr. Clutchette that he was kept in a quiet cell?

A. I think it was the first three days, and then after that he was moved over to one of the other cells.

The Court: Was this before or after disciplinary action?

The Witness: He was moved before disciplinary action was taken.

The Court: He was moved from the quiet cell before disciplinary action was taken?

The Witness: Yes, that's right, yes.

The Court: All right.

Mr. Silliman: Q. Do you know what caused him to be moved?

A. Well, number one, there was space available to move him to another cell. And actually, to put a man initially in the quiet cell, because, if it is assaultive, to make an initial observation. And for that there was no need to leave him there any more, so they moved him out.

Q. Does the quiet cell have one of these oriental toilet facilities?

A. No.

Q. You are not aware, then, whether Mr. Cluchette was moved as a direct result of the doctor's orders?

A. No.

Q. Okay. Now, these MTA's—medical something or other?

A. MTA, right—medical technical assistant.

Q. Do they visit every day?

A. That's right.

Q. What sort of medical training do they have?

A. I am not sure. I know that some of them have been in the service and probably been corpsmen, but I couldn't tell you.

Q. Okay. Do they conduct physical examinations of each inmate in the Adjustment Center every day?

A. Depends what you mean by physical examination.

Q. Well, why don't you describe what they do?

A. I couldn't exactly say, because I have never walked around with them, exactly.

Q. Have you ever been in either a strip cell or quiet cell?

A. I have stepped inside, yes.

Q. Do you find the odor offensive?

A. No, when they are clean. No, I haven't.

Q. Well, isn't it true that they are often not clean, that the floor is often covered with human fecal matter?

A. No.

Q. This is not true?

A. During the time I have been there, I haven't observed that.

Q. How many times have you been in the strip cells or quiet cells?

A. I might go in once a month, something like that.

Q. Have you been in Clutchette's isolation cell?

A. No, I haven't.

Q. Going back to the matter you testified about before for one brief question. The route of appeal, as you understand it, from the disciplinary committee hearing is to somehow contact the associate warden?

A. Right, to write him a memo or, you know, a letter.

Q. That's Associate Warden James Park?

A. No, no, this is the associate warden of custody, Mr. Jacobs.

Q. Oh, I see.

A. Mr. Jacobs, the associate warden of custody is the center—the institutional disciplinary officer. He is the man responsible for disciplinary actions.

Q. How did it happen that Mr. Park approved the action of the disciplinary committee in this case?

A. Well, because in many cases Mr. Jacobs would sit on the disciplinary committees where there would possibly be a felony, and since he sits on it, he wouldn't be reviewing it. So they make it that Mr. Park would review all committee actions.

Q. Well, he didn't sit on this one?

A. No, this day he couldn't make it.

Q. Do you know why it was submitted to Mr. Park for approval?

A. Well, it will be submitted anyway. In other words, it's automatic procedure with the wardens that they will review all committee actions.

Q. Okay, and isn't it true that Mr. Park's mimeographed report was among those that you referred to in deciding on the guilt of Mr. Clutchette?

A. I am not sure, as I say. I would have to look at it.

Mr. Silliman: Okay. I don't have anything further, Your Honor. Thank you.

The Court: All right, now, I'd like to make some inquiry. Number one, the Form 115 recites "See attached supplemental report." Do you have those reports?

Mr. Stein: I have, Your Honor.

The Court: All right.

Mr. Stein: Counsel has already been provided a copy.

The Court: All right, they will be introduced in evidence as the Court's next exhibit.

The Clerk: Court Exhibit 5 introduced and filed in evidence.

Mr. Silliman: Your Honor, we have no objection to the introduction of these reports, so long as we have a stipulation that these are introduced not for the truth of the matters stated therein but only to indicate to the Court what the committee referred to.

The Court: Well, it gives me a better concept, at least, of what's involved here. I am not going to pass on the truth or veracity of the allegations contained therein as they related to the claim of injury and damages. That's not being considered now, and I am only considering it as it relates to the constitutional issues which are presented by the pleadings in the instant case.

Now, you have indicated that there is a manual of some type for running the center, is that correct?

The Witness: Adjustment Center Manual, that's right, yes.

The Court: Disciplinary manual. Now, do we have the disciplinary manual?

Mr. Stein: Your Honor, Mr. Apostol has a copy with him that he brought, but it's the only copy he has. I can have copies made.

The Court: Would you have copies furnished the Court?

Mr. Stein: Yes.

The Court: All right. And furnish a copy to counsel. Do you have a copy?

Mr. Turner: No, we don't.

The Court: All right, you make two copies available, one for counsel for plaintiffs and one for the Court.

Mr. Stein: I am not sure whether there is any confidential material in those.

The Court: Well, I suggest that you submit to the Court the manual. If there is any confidential material, the same may be deleted, placed in a sealed envelope for in camera inspection by the Court.

Mr. Stein: Thank you.

Mr. Silliman: Your Honor, the introduction of these reports raises another area of examination of this witness.

The Court: Relating to what?

Mr. Silliman: Relating to whether or not there was any evidence at all of the guilt of the defendant with regard to one charge.

The Court: I am not going to go into the questions of guilt or innocence at this time. My present function—I will outline to you what my thoughts are in a moment, as soon as I ascertain if there are any further questions to be asked of this witness by the Court.

Mr. Silliman: Your Honor, then at this time may I offer into evidence an affidavit prepared and signed by Mr. Clutchette, sworn to before me, a notary public. The Court will recall that there was some discussion in chambers about the production of Mr. Clutchette as a witness at this hearing, and it was suggested that at least for these purposes such appearance would not be desirable, and I would ask that we be allowed instead to offer his affidavit about some of the occurrences which took place at the disciplinary committee hearing, which are impeachment.

The Court: You mean the hearing itself?

Mr. Silliman: Yes.

The Court: As contrasted to what transpired in the visiting room?

Mr. Silliman: Unfortunately, Your Honor——

The Court: You have both in there?

Mr. Silliman: ——it covers the——

The Court: For the reasons indicated, I will only consider it for what happened at the hearing.

Mr. Silliman: That will be fine.

The Court: The remainder comes within pretty much the same category as those reports which I have.

Mr. Silliman: That's fine, Your Honor. Counsel has been supplied with a copy.

The Clerk: You want this in as a court exhibit, Your Honor?

The Court: Well, that becomes an exhibit of the petitioner. This I am making a court exhibit unless you want to offer it as defendant's exhibit, and then I will make it the defendant's exhibit.

Mr. Stein: We will make it a defendant's exhibit, Your Honor.

The Court: All right, then, these supplemental exhibits become a defendant's exhibit, the affidavit becomes a plaintiff's exhibit.

The Clerk: Defendant's Exhibit A introduced and filed in evidence, and Petitioner's Exhibit 1 introduced and filed in evidence.

[Affidavit form was marked Petitioner's Exhibit 1 for identification was received in evidence.]

[Supplemental form was marked Defendant's Exhibit A for identification and was received in evidence.]

Mr. Silliman: Your Honor, may I also reserve for the purpose of any further hearing or future hearing

an opportunity for further examination of this witness, pending possible discussion of his testimony with my client?

The Court: Yes.

Mr. Silliman: Thank you.

The Court: He will be subject to recall.

I'd like to make some inquiry.

Are there any circumstances under which, as a result of disciplinary action, there is a loss of earned good time credits on the part of any prisoner?

The Witness: No.

The Court: So that as far as San Quentin is concerned, this loss of good time credits does not exist in any manner, shape or form that you know of?

The Witness: Well, I think it went out back in 1940 or 1941, something like that, yes. I don't think there's anybody that's around since then.

The Court: Now, you have indicated that a man who is confined to the Adjustment Center, and that is the particular center in which you are the program officer, loses his work privilege, is that correct?

The Witness: He doesn't have the freedom that he would go someplace to work, so he loses it, yes.

The Court: And the work privilege includes the right to earn some money, does it?

The Witness: If he has a job where there's—yes, that's right.

The Court: Yes. And to use for purchases at the canteen and such use?

The Witness: Right.

The Court: All right. Now, you have indicated that there is an automatic appeal from a recommendation of the disciplinary committee, is that right?

The Witness: That's right.

The Court: Now, is the action of the disciplinary committee in the form of an order or is it completely contingent upon approval?

The Witness: Approval.

The Court: It's completely contingent upon approval?

The Witness: That's right.

The Court: Now, is there an appeal from the ruling of the associate warden? For instance, in this case, Associate Warden Park?

The Witness: Mr. Jacobs, the associate warden of custody, is the one that the appeal goes to.

The Court: So there is a further step in the appellate procedure?

The Witness: That's right.

The Court: Which would be to Mr. Jacobs?

The Witness: Jacobs, associate warden of custody, that's right.

The Court: All right, and how is this initiated?

The Witness: By the inmate writing a letter to him.

The Court: All right. Now, is the inmate informed of his right of appeal at any time, actually informed?

The Witness: I don't know if we do this every time. I don't think we stop and say, "You know, you have the right to appeal." I would say, you know, I think it's general knowledge.

The Court: How long have you been there at the prison?

The Witness: Twenty-three years.

The Court: Twenty-three years?

The Witness: That's right.

The Court: When you say general knowledge, you say that by reason of your twenty-three years experience, that the prisoners in your judgment all are aware of it?

The Witness: I'd say that's generally true.

The Court: They are pretty well aware of every right they have over there, are they not?

The Witness: I would say so.

The Court: Whatever they may be?

The Witness: Yes.

The Court: All right. But there's no formalized rule with relation to right of appeal?

The Witness: No, I don't think there's something that the inmate is given or, you know, that says, "You have the right to appeal."

I don't know of anything like that.

The Court: All right, I have no further questions. Excuse me; sorry I encroached on your time, but you go ahead, Counsel.

Mr. Stein: Thank you, Your Honor.

Cross-Examination

By Mr. Stein:

Q. Mr. Apostol, where was the plaintiff Clutchette incarcerated prior to this incident?

A. Within the Adjustment Center.

Q. He was within the Adjustment Center?

A. Yes.

Q. Now, the term that's been used here recently, "isolation." Does that have more meaning to a person from the main line who is transferred than it does to a man in the Adjustment Center?

A. I would say so.

Mr. Silliman: Oh, I object, Your Honor. He's not capable of stating what it means to other people.

The Court: Oh, this man has been there twenty-three years, and there has been nothing in his testimony up to this point that would justify my not accepting his opinion based upon his experience. Go ahead.

Mr. Stein: Q. Let me take it item by item. A man in the Adjustment Center is normally confined in a single cell?

A. That's right.

Q. A man on isolation in the Adjustment Center is normally confined in the same cell—the same general, maybe not the same exact cell, but a cell of similar type?

A. Similar cell, right.

Q. How much exercise period does a normal inmate in the Adjustment Center get?

A. The one hour a day.

Q. And a man on isolation in the Adjustment Center, how much is he allowed?

A. One hour a day.

Q. Inmates in the Adjustment Center—are they allowed to go to movies?

A. No.

Q. Are they allowed to go to jobs outside the Adjustment Center?

A. No.

Q. Are they allowed to go to the canteen?

A. They don't go to the canteen. We have an officer pick up their items and bring them to them.

Q. Now, a man on the main line; how much time is he allowed in the yard daily for exercise?

A. Well, he is free in the evenings and the weekends when he is not working.

Q. And can he comingle with other main line prisoners?

A. That's right, yes.

Q. And does he have the movies?

A. That's right, once, maybe twice a week.

Q. And he can go to the canteen?

A. Right.

Q. So then to you, the term "isolation" refers mainly to the removal of a man from the main line, placing him into a segregated housing, is that correct?

A. It would restrict his movement in the institution.

Q. Concerning inmates in the Adjustment Center, the term "isolation" doesn't mean that they are completely excluded from contact with other human beings, does it?

A. They can converse with them, you know.

Q. Now, the diet of an inmate on isolation in the Adjustment Center differs from the normal diet in the Adjustment Center in what manner?

A. Only in the dessert.

The Court: Is the Adjustment Center diet different from that in the main line?

The Witness: No, same meal.

Mr. Stein: Q. And the inmate on isolation is allowed his legal material?

A. That's right.

Q. He is allowed visits with outside visitors?

A. That's right.

Q. Approved visitors?

A. That's right.

Q. His attorney?

A. His attorney, parents.

Q. Can Mr. Clutchette see a person who he was visiting when this incident happened, if he comes to visit again?

A. I believe so.

Q. So then, comparing Mr. Clutchette's status as a prisoner in the Adjustment Center prior to and following the action of this disciplinary committee, he has lost one hour's exercise a day for twenty-nine days?

A. M-hm.

Q. His personal possessions other than his legal papers, his religious books, his toilet articles, have been removed from him for a period of—what is that, twenty-nine days?

A. Twenty-nine days, yes.

Q. Now, what privileges has he lost, then, for the period of sixty days?

A. The use of the canteen.

Q. Other prisoners walk up and down in front of his cell daily on their exercise period?

A. That's right.

Q. He is able to converse with them?

A. Yes.

Q. He is able to converse with prisoners on either side of him in his cell?

A. Yes.

Q. Well, let me ask you this: Is there someone on either side of him?

A. There generally is, that's right.

Q. Now, you testified that California no longer has mandatory good time credit, is that correct?

A. As I say, sometime in 1940 they discontinued that.

Q. So that Mr. Clutchette is not being denied the opportunities to shorten his sentence in any manner by this confinement?

A. Not that I know of.

The Court: You get credits for work too?

The Witness: No, there is no such thing as credits.

The Court: All right.

Mr. Stein: Q. Did you work in the California institutions when there was good time credit provisions?

A. No, I think I—No.

Q. Now then, when a man appears before the Adult Authority for his—they appear how often? How often do they appear?

A. Once a year.

Q. Once a year. And you stated that these disciplinary matters are sent to the Adult Authority?

A. It's part of what they review.

Well, they will review what the man's work record is, the writeup of the counsellor on a prereport. They would review what visiting he has done during the year, what the contacts are with the outside, what job possibilities he may have, psychiatric reports, or any other reports that might explain what his behavior had been during that year.

Q. So they review his entire prison file, is that right?

A. That's right.

Q. A part of which is the disciplinary report?

A. That's right.

Q. Approximately how many quiet zones do you have in the Adjustment Center at San Quentin?

A. There's six, including the two, what they call, strip cells.

Q. Okay.

A. Four and two makes six.

Q. Now, was Mr. Clutchette ever confined in a strip cell or an oriental cell?

A. Not that I know of.

Q. Now, you stated that the only difference, then, between the quiet cell and the normal cell at the Adjustment Center in San Quentin is that the quiet cell has a vestibule with a solid door that can be closed, and it has a concrete bed?

A. That's right.

Q. And at the present time Mr. Clutchette is confined in a normal cell?

A. That's right.

Q. At the Adjustment Center?

A. Yes.

Q. Now, turning to the procedures followed by the disciplinary committee at San Quentin, were any of the persons who sat on Mr. Clutchette's hearing on the 20th involved in the incident on the 10th?

A. Not that I know of.

Q. Is there any procedure or rule concerning members of the committee who have taken part in the incident?

A. Well, I say, if a person was to write the disciplinary report, the person that wrote the disciplinary report should not be a member.

The Court: What about the warden? Didn't he make a report—the associate warden—and he turned out to be the man who approved or disapproved it?

Mr. Stein: Q. It's a fact, is it not, that Associate Warden Park filed a report that was considered by your committee in this incident?

A. Probably was. I don't remember that.

Mr. Stein: And that's the first page of Defendant's Exhibit 1, Your Honor.

The Court: Let me see that again. Again not bearing on the question of truth or veracity, but whether the recitations were such as to cause the Court to consider at least for the moment the wisdom of having one who participates in the report also participate in the approval or disapproval of the finding of the committee.

Mr. Stein: The report being referred to is from Associate Warden For Administration of the Prison J. W. L. Park to the warden of the prison, L. S. Nelson, referring to his observations after the incident in question occurred.

The Court: All right, I have read the same.

Mr. Stein: Q. Now, have you ever served, in your twenty-three years, as a hearing officer?

A. Yes, that's right.

Q. And would you tell us what the procedure is for the hearing officer when he first approaches the inmate concerning a complaint?

A. Well, it would be a reading of the disciplinary, and since it hasn't been a felony as far as the hearing officer, if it's a minor offense, you don't worry about his rights, because there is no need to do that. Wouldn't be referred to the DA. You get his plea and then you allow him the privilege of discussing what occurred, and you listen to what he says on that.

The Court: That's just an informal conversation back and forth between you and the particular prisoner?

The Witness: Yes. Actually, the first thing is, "How do you plead?" So you have an idea. Because you want him to plead—because that's important. Then the next thing you ask him is, "Well, tell us about it. What happened?" And then he goes ahead and relates it.

The Court: All right, go ahead.

Mr. Stein: Q. Now, in the case of a major offense like the one Mr. Clutchette has been charged with, you stated that a form headed "Notice of Complaint" would be presented to the inmate by the hearing officer?

A. That's right, if he is going to be referred to a committee.

Q. And this form would normally contain a statement of the charges?

A. That's right.

Q. Would that be similar to the language that appears at the top of CBC 115?

A. That's right.

The Court: Well, let me make some inquiry, then. You give him a form of complaint?

The Witness: The notice of complaint.

The Court: Notice of complaint. Does that notice of complaint allege the violations?

The Witness: That's right.

The Court: Does the hearing officer then advise him of his rights—the hearing officer, now, as contrasted to the committee? In this instance the complaint charges those things which are contained in your 115, does it not?

Now, is it the practice of the hearing officer to advise him of his constitutional rights? You have indicated these are aggravated offenses which could include a reference to the District Attorney for criminal prosecution.

The Witness: I would say the general practice is that they do. I am talking about myself, now.

The Court: Yes.

The Witness: As a hearing officer, if it looks like it's a felony, I will do that, right.

The Court: All right.

Mr. Stein: Q. If it is a major offense that under the guidelines which are introduced would be referred to the disciplinary committee, does the hearing officer conduct any interrogation of the prisoner?

A. No, at this time, when they refer him, he just lets the man know what the charge is, that he's referring it because it's an offense that the committee should hear. And then——

The Court: You don't interrogate him?

The Witness: Not at that time, no, no.

The Court: All right.

Mr. Stein: Q. It would only be in a minor offense that the hearing officer was going to make prior determination, that he would interrogate the prisoner?

A. That's right, true.

Q. Now, is there a rule as to how long after an incident he has to be seen by the hearing officer and given this notice?

A. Sure, should be within forty-eight hours.

Q. And is there a procedure as to how long after an incident he must be seen by the disciplinary committee?

A. As soon as the committee meets. In our case, it's once a week.

Q. And at the time he is given this notice, then this notice contains the date and time, or the date that the charges will be heard by the committee?

A. That's right.

The Court: Who was the hearing officer in this case, do you know?

The Witness: Lieutenant Nelson.

The Court: Lieutenant Nelson?

The Witness: It's usually—I would say the hearing officer is usually the lieutenant or a program administrator. Here in the Adjustment Center it's the lieutenant.

Mr. Stein: Q. Now, does the prisoner have a right to appear before the disciplinary board?

A. You mean in case the hearing officer is hearing the case, he wants to go to the disciplinary committee?

Mr. Stein: No, sorry.

The Court: Assuming you read the complaint to him, does he have a right to appear before the——

Mr. Stein: Q. If the matter is a major offense, it's been referred to the board and you are sitting as the board. Does the prisoner have a right to appear there before you?

A. Oh, he must be present, yes, surely.

Q. And does he have a right to make an explanation of the action?

A. Yes.

Q. Now, do you read the charge against him before he pleads?

A. Yes.

Q. And do you read him the gist of the underlying action from the reports.

A. That's right.

Q. You don't necessarily read all the reports to him?

A. In the case where there's so many supplementary reports, I don't read them all. I will read those that are submitted by the officer that's making the complaint.

Q. Would those be the major charging allegations?

A. The major charging allegations, that's right, yes.

Q. And you stated that no one who sits on this board was involved in the incident?

A. That's right.

Q. And is that a policy?

A. That's right.

Q. Now, does someone take notes of the prisoner's explanation?

A. That's the responsibility of the counsellor who records on the findings, you know, something that the inmate—what his response might be to the charge.

Q. And is that where the final typing down at the bottom would come from?

A. That's right, yes.

Q. Where it states the prisoner's explanations?

A. That's right.

Q. Now, other than the prisoner being present, do you take any live testimony at those hearings?

A. It's the prisoner at that hearing, that's right.

Q. Do you take any face-to-face statements from other personnel or employees, or do they all submit written reports?

A. Written reports. If there's something that maybe I want further information, or it's not quite clear, you know, I will contact the person that wrote the report, or try to get some more information.

The Court: What do you mean by that? You contact him during the committee, or does some member of the committee contact him?

The Witness: It could be either way, but I might postpone it and say it's not clear exactly from what I'm reading, and, you know, I will get ahold of the person that wrote it, to explain to me a little more what it's about.

The Court: All right.

Mr. Stein: Q. Now, you testified earlier that you contacted Warden Park?

A. That's right.

Q. In your experience, have you ever used the phone on other occasions to contact people?

A. I have done this if I wanted to get—if I know the employee is working at that time, I might pick the

phone up and ask him to explain a little more the information about the offense. There are times when an offense is written, where it's in the working area, and I might want to know from the employee if he would want the man to work back in that area again. Just get a little more information.

Q. Now, you stated that after you reach your disposition, it doesn't become final until approved by the warden?

A. That's right. Or a representative. And this is Mr. Park.

Q. What do you submit to him for his approval?

A. The 115, everything we have there in front of us.

Q. So that all of these written reports then, and the notation as to the inmate's statement, goes to the associate warden for administration?

A. That's right.

Q. Now, you outlined an appeal procedure to the associate warden for custody. That in San Quentin is Warden Jacobs?

A. The associate warden of custody would be Mr. Jacobs.

Q. Now, he has the power, does he not, to change the custody of any inmate at the institution, if any inmate complains to him of his custody?

A. Custody would be strictly committee, but he can change the action of the committee.

In other words, if we have given isolation time and he thinks it should be less, he can reduce the isolation time. Or, say, if he wants to expunge it, he can expunge the 115.

Q. Is he bound by the report that you have, or can he go outside and take new evidence?

A. He can get additional information if he wants.

Q. Now, when you have a disciplinary charge which you think will be referred to the District Attorney, and you testified that it is your policy to read the Miranda report to the inmate——?

A. Yes.

Q. Do you interrogate the inmates at a disciplinary hearing, or do you allow them to make a statement?

A. At the hearing you can do both. But I would say you start out first by allowing him to state the situation. Then if you have any other questions, then you would ask him.

Q. And when you read him these rights, then you are telling him that anything he says here to you could be used against him if the District Attorney decided to prosecute?

A. That's right, yes.

Q. So as a result of this disciplinary action that was taken with Mr. Clutchette, besides the loss of his desserts, the loss of an hour's exercise for twenty-nine days, the loss of the canteen for sixty days, he didn't lose any visitation privileges, then?

A. No.

Q. No one was taken off his visitation, the approved visitation list?

A. No, there was no need to do that.

Q. And as far as his visitation goes, the only limitation now is the physical limitation, so that he visits in a single room?

A. That's right. The location is the limitation of where he will visit.

Q. What is the maximum amount of isolation time that the disciplinary committee can give an inmate?

A. Up to thirty days.

The Court: Is that for each infraction?

The Witness: No, it's total.

The Court: Total?

The Witness: Yes.

The Court: So you can't make such time run concurrently [sic] for several infractions?

The Witness: No, if you think it should go over the thirty days, then you have to get the approval from the director. But there wouldn't be a continuation of, you know, days over the thirty.

The Court: Well then, does your manual permit you to recommend in excess of—what? Twenty-nine days?

The Witness: Recommend to the director for his approval; you can do that.

The Court: Recommend to the director?

The Witness: That's right.

Mr. Stein: Q. Are you aware of the director's rule that the inmate not be incarcerated in isolation for more than thirty days at a time?

A. Right, yes.

Q. In your experience in twenty-three years, has the director ever approved an isolation for more than twenty-nine days?

A. I have never been involved in that, in any case.

Q. Have you ever recommended an isolation for longer than twenty-nine days?

A. No, no.

Mr. Stein: I think that fairly well covers it, Your Honor.

The Court: All right.

Mr. Silliman: Your Honor, may we be allowed to redirect?

The Court: Yes.

Redirect Examination

By Mr. Silliman:

Q. Now, Mr. Apostol, this little form here is the one that you read the specific warning regarding interrogations. If it looks like it may be a felony that might be referred to the DA, that is. Is that right?

A. Right.

Q. And you say that, you tell the guy that he has a right to remain silent, isn't that right?

A. M-hm.

Q. You tell him that anything he said can and will be used against him in a court of law, is that right?

And you tell him that, "You have the right to talk to a lawyer and to have him present while you are being questioned?

A. Right.

Q. And if he says, "Okay, I want my lawyer present while you are questioning me, because I have a right to it," then what do you tell him?

A. At this point the reason for this interrogation, or reading the right, is that if he is referred to the District Attorney and he is going to prosecute, that he should know what he might say now could be used in

this proceeding that the District Attorney might take. If he wants the attorney to be present, this will be when the District Attorney prosecutes, or if he does. Not talking about the hearing that we are having right this present time. The hearing we are having now is strictly an institutional hearing. The attorney that we are talking to and reading to him that he would be present, would be present if he is prosecuted by the District Attorney.

Q. Well, still, you do question him about the incident, don't you?

A. If—if he signs it and says he will speak to us. If he says no, then we don't question him.

Q. Well, supposing the inmate chooses to rely on the state of the evidence. In other words, he doesn't think that whatever evidence there is against him is sufficient to prove his guilt. Suppose he chooses to remain silent. Does that end it? Do you then find him guilty and send him to isolation?

A. You are saying if he refuses to discuss it with us?

Q. Yes.

A. You mean since he won't——

Q. Yes.

A. Then from there, we then read the charge to him so he knows what the charge is. We ask him one question, and that is what his plea is. And since he, you know——since he says he doesn't want to discuss it, then we don't and can't discuss it with him. Then we have to make a decision on the evidence that we have on what disposition we may take.

Q. Okay, and has that ever happened?

A. This occurs, sure.

Q. And in fact, in Mr. Clutchette's case, isn't it true that he told you that with regard to the matter that might lead to a determination whether to prosecute by the District Attorney, that is, the assaulting of the guard, that he did not want to discuss it without a lawyer present?

A. No, I don't recall that.

Q. You don't remember that?

A. No.

Q. Now, one of the members of the disciplinary committee in Mr. Clutchette's case was a Lieutenant Nelson, isn't that correct?

A. That's right.

Q. He actually sat in on the determination of his guilt or innocence for the purpose of the isolation, right?

A. Right.

Q. And isn't it true that one of his reports was included among those determinative of Mr. Clutchette's guilt?

A. It might have been. I don't recall.

Mr. Silliman: I think the record will speak for itself on that.

The Witness: Yes.

Mr. Silliman: Q. And with regard to the charge of disobeying a direct order of the guard, that was a more or less minor offense, administrative offense, that was involved here, isn't that right?

A. Between the two, yes.

Q. Do you remember what order it was that he was supposed to have violated?

A. I think it had to do with where he would sit in the visiting room.

Q. Okay. And that particular violation was brought up or signed by a gentleman by the name of Mr. Hahn, isn't that correct?

A. That's right.

Q. H-a-h-n. And isn't it true that Mr. Clutchette asked that Mr. Hahn be present to appear in his defense?

A. I think he did, and I think my answer there was that, you know, the report is written and, you know, we would use the report instead of having somebody else present.

Q. Making reference to the report, isn't it true that Mr. Hahn said in his report, "Subject then got up from his seat and walked over to the under-the-table——"

Mr. Stein: Getting down into the——away from the proceedings.

The Court: Yes, I think so.

Mr. Silliman: Your Honor, if I may be allowed to read two sentences?

The Court: Well, the report is the report that was attached, and that's the report you are referring to?

The Witness: Yes.

The Court: Doesn't that take care of it?

Mr. Silliman: Your Honor, that's true. I am only trying to point out that Mr. Hahn's report indicates in and of itself that he was not guilty of violating an order.

The Court: Well, you can call that to my attention at the proper time.

You were cognizant of that fact, weren't you?

The Witness: I read the report.

The Court: Yes.

Mr. Silliman: Okay, thank you.

Q. Now, isn't it true that while the diet remains the same as on the main line, that the food generally, when it reaches the inmate, is cold?

A. It's some distance from the kitchen into the Adjustment Center.

Mr. Stein: Your Honor, I will object. I don't see the relevance to the issues.

The Court: Oh, we have had it. Go ahead, go ahead.

A. [Continuing] I think because of the distance between the kitchen and the Adjustment Center, it would be——I don't say cold; I mean, it wouldn't be as warm as the man taking it right off the steam table in the kitchen.

The Court: In other words, he wouldn't have to put his coffee in the saucer to cool it?

The Witness: Yes.

Mr. Silliman: Q. Okay. And with regard to visitation, no one was taken off of Mr. Clutchette's visitation list?

A. No.

Q. However, he was restricted to visitation in what are called the death row visiting rooms, right?

A. That's Room A and B, right.

Q. And those are the death row visiting rooms?

A. They use those, right.

Q. Okay. As a matter of fact, everybody calls them the death row room, right?

A. I don't know. I don't——

Q. And isn't it true——

The Court: Well, there's no sign over the door that so indicates?

The Witness: Not that I know.

The Court: It's a room in which two people can sit and converse?

The Witness: That's right, yes.

The Court: All right.

Mr. Silliman: Q. Okay, And isn't it true that the length of the visit was restricted?

A. No. We explained to him, and this is one thing I talked to Mr. Park about, that because there's only two facilities and there might be a lot of people using it, that——the only thing I said, that there may be a limitation on time for other than lawyers or parents. And we informed him that that might be reduced. But not for parents or lawyers.

It would be just for other than those people.

Q. Well, isn't it true that you recommended a reduction of time? Isn't it true you recommended the use of Rooms A and B with time limitations when necessary?

A. With limitations in case that they had to use the space, is what it was.

Q. All right.

A. If there was no one else needing the space, he didn't, you know——he would have the full time in there.

Q. Isn't it also true, isolation inmates are served their meals on paper plates, as opposed to the other inmates?

A. No, no.

Q. That's not true?

A. That's only if necessary. If you are concerned about the plate being used as a weapon, you would use paper plates.

Q. Isn't it true Mr. Clutchette has been served his meals off paper plates?

A. Might be. I don't know.

Q. And isn't it true that they are only served meals twice a day, morning and evening?

A. No. Breakfast, lunch and dinner.

Q. Isn't it true that the lunch consists of one sandwich which is brought in with the breakfast tray?

A. For isolation this may be true. I don't know.

Q. Isn't it true that it's possible for someone in the main line who comes to the attention of the disciplinary committee to be placed directly in a quiet cell or strip cell without having to go through the Adjustment Center process?

A. I don't quite understand what you mean by that.

The Court: Well, you mean before a disciplinary hearing?

Mr. Silliman: Yes.

The Court: Or without one?

Mr. Silliman: Without a disciplinary hearing.

The Witness: You'd be placed generally into what we call a holding cell. You would be in administrative segregation until the committee, you know, saw you.

Mr. Silliman: Q. Where are these holding cells?

A. Well, for general population it would be in B section, not the Adjustment Center.

Q. Do they have quiet cells and strip cells in B section?

A. They have quiet cells in B section, not strip cells.

Q. And are these the holding cells that you are talking about?

A. If in your opinion, let's say, the man appears assaultive or something, he may be put in the quiet cell. But generally that's not the practice, no.

Q. And once he does appear before the disciplinary committee, he can then be placed in the Adjustment Center on the isolation side in a quiet or strip cell?

A. But that's not the practice, no. Not for people from general population.

Q. Well, if not, why not? Why make an exception for them, or vice versa?

A. It's different housing.

Mr. Stein: Your Honor, I don't see the relevance of this line of questioning.

Mr. Silliman: A class action, your Honor—for all persons.

Let me just clear up one thing.

Q. As a result of disciplinary committee action, a main line inmate—that is, general population inmate—can be put in isolation, could even be the same cell that Mr. Clutchette now occupies, for twenty-nine days, correct?

A. Could be.

Q. Isn't it true that Mr. Clutchette asked to be allowed to see these supplemental reports?

A. Yes.

Q. And he was not.

A. Physically we don't let them observe them.

The Court: This is a general practice?

The Witness: That's right, yes.

This is the policy. And I have gone through this many times. And if they ask to see it, I just tell them that, you know, "I can read it to you, but I can't physically give it to you."

The Court: Is there anything in the rules that says that, or is this just a practice that's grown up?

The Witness: This is a practice, yes.

Mr. Silliman: Q. And the form that you use for notifying them that something, that the hearing is pending—I had it a second ago.

The Court: No. 2?

Mr. Silliman: Exhibit No. 2, yes.

The Court: This is the form?

Mr. Silliman: Q. CDC Form 263. How long has that been in use?

A. I really don't know. I could say it's been in use, as far as I know, at least for the last five years, and it might be longer than that. I couldn't attest to that.

Q. And this has a place where he signs so that he has acknowledged receipt?

A. That's right.

Q. Now, do you have—did you get such a thing from Mr. Clutchette?

A. No, he didn't sign it

Q. You showed it to him, but he refused to sign?

A. That's right.

Q. And did you have him sign the waiver that you read to him, the Miranda waiver?

A. He signed that.

Q. Okay. No reluctance then?

A. No.

Q. Now, you are required to have three people sit on this committee?

A. A quorum of three, right.

Q. Okay. Where is that requirement set out?

A. It's in the institution inmate rule plan.

Q. Okay, and does that provide who it is that is supposed to sit on the disciplinary committee?

A. It lists people in my position who would be on it, right.

The Court: May I inquire, Counsel, as to how much longer you will be?

Mr. Silliman: About two minutes.

The Court: Oh. Go right ahead.

Mr. Silliman: Q. What happens if the vote. . . . Well, let me ask you this. Is the vote ever not unanimous as to guilt or innocence?

A. I would say from my experience, generally it comes to—I'd say it's generally unanimous.

Q. Can you remember any instance where it was not?

A. In my experience, no.

Q. Are you aware, or were you aware at the time of the hearing, that I had sent a telegram to Mr. Park requesting that I be allowed to be present, that Mr. Clutchette be allowed to present witnesses whether or

not I was present, and that we be allowed to supplement the evidence with affidavits from outside persons?

A. No, I didn't.

Q. You weren't aware of that?

A. No.

Mr. Silliman: Those telegrams, or copies thereof, Your Honor, are attached to the original complaint on file.

The Court: Yes.

Mr. Silliman: Q. Are there any recommendations made when the matter is referred to the District Attorney's Office?

A. No.

Q. Were there any recommendations made to the Adult Authority in Mr. Clutchette's case?

A. There was no need, because you only do that when a man has a parole date, and then at that time your recommendation would be either that you recommend that he loses his parole date or he retains it.

Q. Well, were you aware at the time that Mr. Clutchette was placed in the Adjustment Center at Soledad, pending investigation of the matter for which he now stands charged in Superior Court of the State of California, that he had a parole date?

A. No.

Q. Isn't it true, Mr. Apostol, that the only reason that there isn't much difference between isolation and the Adjustment Center is because there aren't very many things that you can do with him within the realm of human decency that he—

Mr. Stein: Object, Your Honor. Argumentative.

The Court: I can't—you are coloring the question. You didn't ask a straight fact question. Up to this point this has been a very fine hearing. Go right ahead.

Mr. Silliman: Let's not let it blemish the record. I will rest.

The Court: All right. Do you have any further questions?

Mr. Stein: Just two brief matters on recross.

The Court: Yes.

Recross-Examination

By Mr. Stein:

Q. Mr. Apostol, do you have any idea how many prisoners are presently incarcerated in the State Prison system?

A. Roughly twenty-five thousand.

Q. About how many disciplinary hearings were held at San Quentin last year, just infractions?

A. I would say roughly four thousand, something like that.

Q. Now, when the board is deliberating after they have heard the prisoner, read the reports—when they are deliberating, is it fair to say that the major deliberation is over the proper disposition of the matter

A. You mean while the committee is meeting?

Q. Right.

A. Yes.

Q. In that case you deliberated considerably and phoned outside to determine what to do about the visitation situation?

A. That's right, yes.

Q. That consumed most of your time?

A. Yes.

Mr. Stein: That's all I have.

The Court: All right, do you have any other witnesses you want to produce?

Do you wish to recess at this time?

Mr. Silliman: If Your Honor please, I have no further witnesses, other than the fact that I still desire to present testimony from my client. I don't know when or how that can be achieved.

The Court: What I am interested in, very frankly, gentlemen, is the hour. If we are going to have any further discussion that will take up any time at all, I would suggest we recess until two o'clock, and then we will all feel a little better.

Mr. Silliman: I am in favor of that.

The Court: All right, we will recess until two o'clock.

[Witness excused.]

[Hearing recessed until 2:00 p.m.]

Friday—December 4, 1970—

Afternoon Session—2:00 p.m.

The Clerk: Civil Case No. 70-2497, John Wesley Clutchette versus Raymond Procunier, for further hearing.

Mr. Silliman: Your Honor, we have at this time no further evidence to present.

We do have the situation that we have described a condition which would probably be made that much more vivid either on the presentation of the photographs or a personal visit by Your Honor to the Adjustment Center. I would—

The Court: Do you think the legal question presently before me necessitates any of this?

Mr. Silliman: I think perhaps that it does, Your Honor. But maybe you disagree. I would only say that if photographs would be of aid to the Court, I would be glad to see to it that they are taken. But as yet, I have been denied access to the area myself, and I would need an order to allow me to go in and take photographs.

If Your Honor would give me such an order, I would take them this afternoon, have them processed and returned by Monday.

The Court: Well, let's find out what the position of the Attorney General is.

Mr. Stein: Well, Your Honor, I think a lot of these lawsuits of this type are brought about by a misunderstanding of the conditions in the Adjustment Center. It's a difficult place at best, and it's a difficult place to describe. There's many preconceived opinions of what goes on in there and what it looks like. And if this Court is interested in touring the facilities, we would be more than glad to make that available to this Court at any time.

The Court: Do I interpret your observations as an expression of the view that a visit by the Court would not be deemed by anyone as an intrusion into internal affairs?

Mr. Stein: No, not at all, Your Honor. As a matter of fact, Your Honor, I would almost solicit that you do tour. I think it's probably something that should have been done a long time ago. I think a member of this particular court should tour. Now, Judge Harris, of course, toured Soledad some years ago in Jordan versus Fitzharris, and I don't know of any other Judge that has.

The Court: Well, some years ago I toured San Quentin myself, but that's quite some time ago. I have visited a great number of penal institutions, so there would be nothing novel in a further visit on my part.

Well, I will take that under consideration, gentlemen.

Mr. Stein: Thank you.

Mr. Silliman: I would certainly join in the solicitation, Your Honor. One thing that the photographs cannot convey is the stench. Secondly, I have one further problem with regard to this lawsuit, and I don't know whether this is the appropriate time to bring it up, but I will mention it to the Court and perhaps you can advise me.

There has been a continuing problem with regard to mail between attorneys and clients, specifically my client, with regard to the case that is pending in the Superior Court in the State of California. And that is up until. . . . Well, the present situation, let's say, is that he can address letters to me and they will go out unopened; however, all mail from me to Mr. Clutchette is opened and read by the prison authorities. To my mind—

The Court: Well, do you have any allegation on this in your complaint?

Mr. Silliman: No, I don't, Your Honor.

The Court: How am I going to pass on an issue that is not before me?

Mr. Silliman: Well, this matter will undoubtedly be raised very shortly in a separate lawsuit, or perhaps we can bring it up within this one.

But I have the additional problem—not in addition to the problem that I have with maintaining the attorney-client confidential relationship with regard to the lawsuit in the Superior Court—I now have the problem of preserving that relationship with regard to this case and in the unique situation where the defendants themselves are the ones who are opening and reading the mail. And therefore I would ask for an order from this Court that I be allowed to correspond with my client with complete confidentiality.

The Court: Well, I really don't have anything before me that indicates that you can't.

Mr. Silliman: That I cannot?

The Court: Yes, that you cannot.

I don't have anything before me to indicate you cannot. I have no way of knowing whether that is or is not the fact. And I think the State ought to have an opportunity to respond.

Mr. Silliman: Very well. I will make it in the form of a formal motion at a later time, with supporting declarations and so forth.

The Court: All right.

Mr. Silliman: We have no further evidence.

The Court: Do you have anything further to submit this afternoon?

Mr. Stein: No further evidence, Your Honor.

The Court: May I inquire now as to just, in one sense, what the posture of this case is? We have an amended complaint on file. The prayer for the amended complaint is one for declaratory judgment of the "Defendant's acts, policies and practices complained of herein violate plaintiffs' rights and the rights of the members of the plaintiffs' class, secured by the due process and equal protection clause, the Fourteenth Amendment." And a preliminary and permanent injunction enjoining defendants from summarily punishing plaintiffs and members of the class, and from inflicting serious punishment on them without providing them with minimal safeguards of due process of law, is sought. A preliminary and permanent injunction setting aside the disciplinary action taken against the plaintiff, Clutchette, on November 20, 1970, and against Plaintiff Jackson. . . . Was Plaintiff Jackson in this case originally?

Mr. Turner: No.

The Court: Plaintiff Jackson on November 25. And expunging these actions from defendant's records, restraining defendant from reporting such action to the Adult Authorities, and reinstating plaintiffs' normal prison privileges.

Now, I take it, then, that the petitioners, the plaintiffs in this action, are not requesting the Court to pass upon the constitutionality of any regulation having statewide application?

Mr. Turner: That's true.

The Court: And I take it that this manual that we had some reference to, and which I have yet to see, and which will be furnished to the Court, is a manual that is not considered in lieu of the regulation for the statewide application? Because I don't know about this manual; I don't know who promulgated it, the circumstances under which it's promulgated or anything that goes to a determination of whether that manual should be deemed the equivalent of a regulation having statewide application.

It would appear to me that this may be of some significance in view of the position that the Ninth Circuit took on Gilmore. Whether I agree with the Circuit Court's conclusion in Gilmore, as to its being a three-Judge court, is beside the point. Now that I don't know.

Mr. Turner: Your Honor, I think it's clear from Mr. Apostol's testimony that the focus of this lawsuit is on the practice at San Quentin, and that the practices are not those mandated or even mentioned in any regulations al all, much less a regulation of statewide applicability.

The Court: Well then, I take it—are you questioning the constitutionality of the manual as such in any manner, shape or form?

Mr. Turner: I am not sure which manual Your Honor is referring to, but I don't believe so.

The Court: Well, I am referring to the one presumably as to which we received testimony, and which I have yet to see.

Mr. Silliman: So do we.

Mr. Turner: We don't have it either.

Mr. Stein: Perhaps I should make my point clearer.

The Court: All right.

Mr. Stein: There is a statewide director's rules promulgated by the Defendant Procunier. I don't think there is any question as to their statewide application. They provide, in Rule 4502, that each institution shall establish a plan for the administration of inmate discipline, and that is what we were referring to earlier, which will be copied and provided for the Court. So that particular plan refers only to San Quentin. But that plan must be submitted to and approved by the director before it's implemented, and it's reviewed by the director annually. And it is our position that that particular plan, although drafted by the personnel at San Quentin, is in effect the ruling of the director pursuant to his rules.

Now, as the Court is aware, in a case arising out of Soledad, Randall versus Fitzharris, these same allegations are made on the basis of the same type of disciplinary proceedings, plan for administration of prison discipline, at Soledad.

It's our contention that the attack that's being made here—

The Court: The Randall case you are talking about is one of recent filing and no adjudication?

Mr. Stein: That's right, that was filed yesterday.

The Court: Yes.

Mr. Stein: Raising the same type of attack. It is our position that the attack that's being raised, the request of due process guarantees of counsel at these hearings, the right to call the witnesses in their own

behalf, the right to cross-examine witnesses against them, are matters of statewide application.

The Court: Well, I think in order that I may have a complete record. . . . What is this Director—?

Mr. Stein: This is the State of California Department of Corrections, Rules of the Director of Corrections and the Wardens and Superintendents.

The Court: Well then, I ought to have that made part of the record of this case.

Mr. Stein: I will have a copy of that furnished.

The Court: So that I will have that record and the manual.

Mr. Stein: Right. Does counsel have copies of those in other matters?

Mr. Turner: Yes.

The Court: Well, you might make another copy for them. Get another copy for them, as long as you are getting one.

Now, all right, I have indicated some of those questions. Now I also want to ascertain the position of the petitioners here with relation to the nature of the disciplinary actions of which they complain. As we have already learned in the course of testimony here, there apparently are three categories of offenses, which, for our present purposes, on the Form 115 are designated as A, D and M. I should like to know whether the position of the petitioners here refers to disciplinary action in any manner, shape or form, or what it is they have in mind. There is some indication from a reading of the cases that a distinction must be made between those types of discipline which, in a sense, can be said to be discretionary with the

administrative office, as contrasted with those that might be ministerial. In other words, this really fine distinction, whether there is justification for it or not, has apparently been made in cases on this subject heretofore.

And if there is any valid distinction, this Court ought to have that in mind. Now, I don't know what counsel's views are on that subject, and I would like to invite some expression of views.

Mr. Turner: If Your Honor please, our basic position is that prison officials can't impose serious punishment without complying with the due process clause.

The Court: That's the difficulty: What is serious punishment?

Mr. Turner: Well, serious punishment here takes two forms. The primary thrust of this case is about transfers to some form of disciplinary confinement, whether it's called an isolation cell or strip cell or whatever it's called. They take the inmate from the general population and put him in what is in effect a jail within the prison.

Now, there's another punishment which is present in even the minor infractions, in the cases of minor infractions, and of course also present in the major ones, and that's referral to the Adult Authority, with the consequent effect on the man's sentence, his chances for parole and the length of time he has to serve in prison. So we can't ignore in this case even the minor infractions, so long as the prison officials are required to refer even those to the Adult Authority.

The Court: Well, has anyone made any effort to delineate these distinctions in the form of a brief?

Mr. Turner: Your Honor, the distinction between the three categories of offenses came as a surprise to us today. We did not know that procedure. If Your Honor desires it, we will be glad to brief it.

The Court: Even the most favorable cases that you have cited speak of these distinctions, and they keep saying "This is a serious matter," or, "This is a serious offense," therefore always leaving some inference that there may be areas within which some action may be taken in the discretion of the officer.

And I could understand that could very well arise, because certainly the Court has no desire to move in and run the institution.

Mr. Turner: Certainly not. And we are not asking for any such thing. It would be completely inappropriate for a Federal Court to review the action of a prison official—for example, taking away every Saturday afternoon movie privileges for some minor offense. That's not what this case is about. On the minor offenses, if there was no referral to the Adult Authority, for instance.

The Court: Well, that represents the type of question that—presumably, of course, there ought to be a standard to determine what is a minor offense as contrasted to what is a major offense. Now, the closest thing I have to that, for the moment, is this definition of disciplinary infractions which came before us this morning. I don't know whether this is the type of guideline that counsel would envision or not.

Mr. Turner: Well, the focus of our position is not on whether the offense charged is serious or minor, but whether the punishment imposed is serious or not.

The Court: Well, as I say, I am asking for the observations of counsel. You may or may not be of assistance to me, depending upon the ruling I make. It may be that I will have to do all the defining myself.

Mr. Stein: Might I observe at this point that I don't think that the case is at that point, for such a determination, at this time.

The Court: Beg pardon?

Mr. Stein: I don't believe that the case is at that stage for such decision.

The Court: Well, I will let everyone argue now, I am trying to consider all the problems that may arise, so that I get the respective points of view. Then I will make all the necessary determinations at the appropriate time.

Mr. Silliman: Your Honor, may I add one remark to what Mr. Turner was saying?

One of the problems that we face in suggesting a standard is that all of these matters, no matter how minor, so long as they result in this 115 as it's called, come to the attention of the Adult Authority. They are little pink sheets that go into the inmate's file, and they are looked at by the Adult Authority. And the problem that we have in defining for our benefit any standards is that we are open-ended on both ends. Not only are we concerned about the range of punishments that are available to the disciplinary committee,

but as a second matter, I am sure the Court is aware that the Adult Authority has no restrictions or standards set out for it on which to determine whether or not they have to grant the person a parole after so much time or after some specific kind of behavior. So that what we are complaining about is the fact that this material, even so far down as the minor infractions, is brought to the attention of the Adult Authority. What they do with it after it comes to their attention, we not only don't know but we can't control. And that's why we think that there should be some restrictions on what is brought to their attention.

Unfortunately, we cannot, at least the way I understand our abilities within the protection of the Federal law—we cannot ask you to prescribe standards, at least under this suit that we have filed, for the Adult Authority. So we are wide open. They can take the most minor infraction in a man's file and deny him parole based on that. And if that is to be the situation, then it has to be our position that all infractions that come to the attention of the Adult Authority, no matter how minor or how major, have to fall within the purview of this lawsuit.

The Court: Of course that's an area that's been partially explored by the Courts, as far as the Adult Authority is concerned, including this Court. Now, you had indicated that in your view we hadn't reached this posture of the case.

Mr. Stein: That's correct, Your Honor.

The Court: On ruling. All right, now, I'd be glad to hear from you.

Mr. Stein: Well, the defendants are here today in response to an order to show cause limited solely to show cause why they should not be enjoined from taking further action against one named plaintiff, Mr. Clutchette, as a result of a disciplinary hearing that was held following an incident on the 10th of November. Now, that's the sole reason that we are here. That's the sole notice that we have.

The Court: Well, I know, but this case encompasses considerably more than that.

Mr. Stein: True, Your Honor. And I assume that if the injunction is granted or denied, that then the matter will go on to a hearing on the merits of the complaint for declaratory relief. But I don't believe the matter is ripe for decision at this time on that.

The Court: Well, what can I do in a hearing that could be as extensive as we might want to make it—and I am inquiring now,—that would give me any more substantial evidence in the final analysis, without indicating what the ruling of the Court may or may not be in the premises? What additional evidence could I get which would be of assistance to the Court in determining the basic constitutional question before it at the present time, namely, whether the disciplinary hearings as conducted at the present time at San Quentin, and by the committee, do or do not meet the minimum requirements of due process?

Will I get additional evidence that can be of some aid to the Court?

Mr. Stein: I think as far as the procedures go, there's no additional evidence that can really be

brought forth. But due process turns on the nature of the interest invaded.

The Court: Well, that becomes part of your legal argument, doesn't it?

Mr. Stein: The only evidence we have as to an interest being invaded is Plaintiff Clutchette's interest in this case.

The Court: Well, the interest invaded is the fact that the man was placed in isolation, let's say, for a period of twenty-nine days.

Mr. Stein: That's correct.

The Court: All right. Now, that may or may not be the type of interest that calls for what the plaintiffs say is minimum due process. It may or may not. That may be part of the test in the so-called balancing of interest that you indulge in. And I am giving it a quick and loose definition.

Mr. Stein: That's the interest to be decided today, whether or not a preliminary injunction should issue as to Plaintiff Clutchette.

The Court: Well, let me inquire, if that issue is resolved, by way of illustration, with the conclusion that that interest has been invaded, would not the Court then be, then and there, bound to make a finding on the disciplinary procedure itself? I can't balance unless I consider due process.

Mr. Stein: Right. As to the Plaintiff Clutchette, right. Now, if in fact an injunction issues as to Plaintiff Clutchette, I assume the case is decided for all purposes, because if the man's interests—if the interest invaded here, if we didn't provide sufficient due

process guarantees for the interests invaded here, then of course as to all persons below that interests have been invaded to a greater extent, and then that would be determined again.

The Court: It would apply to all persons similarly situated.

Mr. Stein: Right.

Mr. Silliman: I take it, Your Honor, that the Attorney General is not contending that the way in which Mr. Clutchette's hearing was handled was particularly unique. If that's the case, then I think Your Honor is correct, that the determination as to the adequacy of the hearing—

The Court: Well, I am not saying this is the type of case I'd have, because I have no desire to be passing on each individual disciplinary matter that takes place at San Quentin. And of course I can't help but observe, while we are discussing it, that while the Court may be of some assistance in delineating standards for disciplinary proceedings, or for treatment to upgrade conditions in incarceration and penal institutions, the fact remains that ultimately the approach for any new penology has to come, if its going to be more than a theoretical aim—has to come from the executive and the legislative branches of the government, with appropriate expenditures of money to secure adequate reforms if they are needed. All the Court can do is help delineate some standards, that's all.

Mr. Silliman: That's all we're asking.

Mr. Stein: My position is that if it's found that an injunction should issue as to Clutchette on the

showing here, then the order to show cause would be discharged and the matter would then go on, I think, possibly through a motion on our part to dismiss the complaint. If an injunction issues as to Clutchette, then of course I think the matter is—

The Court: Well, but you are talking about preliminary injunction. Shouldn't any injunction that I issue now be really permanent in character and tested on appeal?

If I were to issue an injunction?

Mr. Stein: If an injunction issues, I am convinced it would be tested on appeal.

The Court: All right. Well then, I think you gentlemen have given me all I need have for our present purposes, and this order to show cause and the hearing thereon may be deemed submitted.

Now, does anyone want to offer any further authorities?

Mr. Stein: Yes, Your Honor, we would of course like to file a brief.

The Court: You want to file a brief? Well, I won't mark it submitted until the briefs are in. Did you want to file a further brief?

Mr. Turner: I think it might be helpful, Your Honor.

The Court: Now, let me inquire. You are of counsel in Sostri [phonetic spelling].

Mr. Turner: No, I participated in Sostri in the Second Circuit as amicus curiae.

The Court: Yes.

Mr. Turner: I am not of counsel.

The Court: What is the status of the case there?

Mr. Turner: It is under submission.

The Court: How long has it been under submission?

Mr. Turner: It was argued October 21st.

The Court: And do you recall the members of the panel who heard the argument?

Mr. Turner: It was en banc.

The Court: En banc? That's even better. What was the date? September—?

Mr. Turner: October 21st.

The Court: And that's not too busy a court?

Mr. Turner: I don't think you would persuade the members of the court of that.

The Court: Well, it's been my practice to study these statistics annually for the past ten years. So I am persuaded that on the basis of the number of cases per judge, it's not as busy as some other circuits. I make no comment as to the qualifications of the members of that circuit, because I think it is one of the better circuits in the country, without a doubt.

Mr. Turner: Certainly.

The Court: All right.

Mr. Turner: There are a number of other cases involving the Sostri issue which are also in the Second Circuit, which have not yet been argued, and the Court may wish to decide on them all at once. I wouldn't want to predict when that decision—

The Court: There are also some cases pending in the Supreme Court of the United States which have already been argued, on the doctrine of abstention, that could conceivably have some bearing even on a case of this character; because it's unfortunate that these

cases come into Federal Court. But preliminarily, they really should be cases that the highest court of the state ought to have an opportunity to pass on. That would be a better and more ideal situation, if it could come to pass.

But apparently there hasn't been much success in bringing it about.

Mr. Turner: No. And there can't be a decision in this case except on Federal Constitutional grounds.

The Court: Well, but the State Courts are bound by the same Constitution; there isn't any difference for them. Well, how much time on this briefing?

Mr. Turner: We really are serious about seeking preliminary relief, and we don't want the briefing schedule to drag on very long. We could probably get a brief to Your Honor within a week.

The Court: Well, let me say one thing. I share your interest in preliminary relief, but very frankly, I don't intend, if I write an opinion in this matter—I don't intend to write an opinion that I have to re-write at some later date. Therefore I want to give it the care and attention that would make it the opinion of the Court. So—you suggest a week?

Mr. Turner: I think we could get our brief to you in a week. We are going to order the transcript.

The Court: That's another thing. I wish a transcript to be made. You are having a copy of the transcript too?

Mr. Stein: I was not planning to order a copy of the transcript.

The Court: Well, I would recommend that the State of California extend itself, and you might even

get the necessary executive officer to approve this expenditure.

Mr. Stein: I could not at this time say that we could order a transcript, Your Honor. We are in very serious financial trouble.

The Court: Well, I know, but the cost involved here . . . . Well, at all events, I will require transcript for the Court, and you are ordering a transcript?

Mr. Turner: Yes, Your Honor.

Mr. Silliman: Your Honor, is there a way, without the necessity of reaching the ultimate decision, one obviously of very serious consequences, to restore to Mr. Clutchette pending this period of time the very minor things that they have taken away from them, according to their own evidence—that being the right to walk around outside his cell for an hour a day, the right to have his materials, his property returned to him, the right to visit——

The Court: Well. I don't know any way I can do it without really passing on the merits, very frankly. I don't know of any way that I can. Oh, I can, by making a ruling that there is irreparable harm and the probability of success, and everything else. But in my experience, when I am ready to make that ruling, and I have all the records that I am going to have before me, I'm really deciding the case. So I would like to have whatever ruling I make supported by a memorandum opinion, and that's why I made these inquiries as to time.

You suggest a week. I would like to know how much the State wants. If you gentlemen can get your briefs in sooner, so much the better.

Mr. Silliman: Well, Your Honor, based on that information, I think I can represent on behalf of Mr. Clutchette that he can stick it out for as long as you need to write a well-considered opinion.

The Court: How much time do you suggest?

Mr. Stein: I am trying to decide. He's talking about a week from today or a week after the record is prepared?

Mr. Turner: I meant a week from today, but in view of Mr. Clutchette's lawyer's statement, I would prefer to have the week after we get the transcript.

The Court: All right.

Mr. Turner: Ten days.

The Court: How long would it take to get the transcript, Mr. Rich?

The Reporter: About a week, Judge.

The Court: All right, you want fourteen days from today?

Mr. Turner: I'd rather have ten days after we get the transcript.

The Court: Well, but I want—all right, ten days after you get the transcript, but then I will make that decision now.

Mr. Evensen, have you added these days all up?

The Clerk: Ten days after the transcript would be December 21, Judge.

The Court: All right, December 21 for the opening brief. How much time?

Mr. Stein: Ten days, Your Honor.

The Court: All right.

Mr. Stein: January 31st?

The Court: No, I will give you until January 4th, then, Monday. January 4th, and the case will be marked submitted. All right, gentlemen?

Mr. Silliman: Do I understand Your Honor will visit, or have you taken that under consideration?

The Court: No, I have what I deem is——

Mr. Stein: The State's invitation, Your Honor——

The Court: ——an invitation to visit the prison, and I am being solicited to do so by both sides. I may very well do it.

Mr. Silliman: May I add, Your Honor, I would recommend that you visit it unannounced.

The Court: Well, I don't know whether I am going to do that or not. I will have to tell you one thing, there is one thing that the Court does not want to do. The Court does not want to intrude on any prison official in any sense that creates the impression I am meddling. I am trying to ascertain the facts and I am trying to ascertain the truth. There are circumstances when unannounced visits are the better way of doing it. That happened to be my practice when I served on the Board of Supervisors on the City and County of San Francisco; when I wanted to know what the condition was in a particular hospital or other institution, I would visit unannounced. But that was a specific and definite prerogative that I had, actually a requirement of my office at the time. Here, if the warden expresses a desire that there need be no notice, then I can do it in that fashion.

Mr. Stein: I have arranged these visits before, Your Honor. Notice isn't really necessarily required

to avoid a waste of time on your part, since the Adjustment Center has to be secured, prisoners have to be placed in the cells. A phone call from this office probably before you left would take care of the matter by the time you arrived.

The Court: All right.

Mr. Stein: But you could arrive unannounced. It's immaterial to us.

The Court: All right. Any other matters?

All right, we will take a recess.

United States District Court,
N. D. California.

No. C-70 2497.

John Wesley Clutchette et al.,
Plaintiffs,
vs.
Raymond J. Procunier et al.,
Defendants.

June 21, 1971.

MEMORANDUM OPINION AND ORDER

ZIRPOLI, District Judge.

This civil action is brought pursuant to 42 U.S.C. Section 1983 to seek relief for state prisoners from alleged deprivation of their constitutional rights secured by the due process and equal protection clauses of the 14th amendment by state prison officials in prison disciplinary hearings. More specifically, they allege that the procedures by which charges of violations of prison rules are adjudicated do not contain sufficient due process safeguards, consistent with the nature of the potential punishment, to meet the standards of the 14th amendment. Plaintiffs seek a declaratory judgment, preliminary and permanent injunctive relief and damages for plaintiff Clutchette.

The complaint was filed on November 20, 1970. On the same day, the court issued an order to defendants

requiring them to show cause why a preliminary injunction should not be granted enjoining certain disciplinary proceedings and punishments.

On December 3, 1970, plaintiffs filed an amended complaint. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b) (1) and Rule 23(b) (2) of the Federal Rules of Civil Procedure, on behalf of all other inmates of San Quentin State Prison affected by the disciplinary practices and punishments challenged in this case.

On December 4, 1970, a hearing was conducted on plaintiffs' motion for a preliminary injunction. At the hearing plaintiffs called Mr. John Apostol, a program administrator employed by defendants at San Quentin Prison. In addition, certain documentary evidence was introduced and the court requested that the parties file briefs on the issues.

INTRODUCTION

At the heart of this case lies the serious question of the extent to which federal courts should intervene in the administration of state prisons generally, and the procedures for maintenance of discipline more specifically. Traditionally, this area has been relatively free from court intervention, absent unusual circumstances. *See, e. g.,* Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964). However, it is well settled that "a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the

prison doors." Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968) (Blackmun, Cir. J.). Violations of these rights are cognizable in federal courts under 42 U.S.C. § 1983. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964).

Recently, federal courts have subjected state prisons to increasingly stricter scrutiny. In Jordan v. Fitzharris, 257 F.Supp. 674 (N.D.Cal.1966), Judge Harris of this court held that certain conditions in the California State Penitentiary at Soledad were in violation of the "cruel and unusual punishment" clause of the eighth amendment.[1] A three-judge court of this district ruled that prison law libraries must meet certain minimum requirements so as to insure access to the courts. Gilmore v. Lynch, 319 F.Supp. 105 (N.D.Cal.1970). Regulations providing for opening and censoring of prisoners' mail are currently under attack, Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Ohio 1971), and this court recently held that the first amendment requires prison officials to provide copies of the Holy Qu-ran and Black Muslim ministers at state expense for Black Muslim prisons, and may not exclude copies of Muhammad Speaks. Northern v. Nelson, 315 F.Supp. 687 (N.D.Cal.1970).

In other districts, courts have applied traditional due process standards to prison disciplinary proceedings and found them seriously inadequate. See Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Sostre v.

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[1] *See also* Brenneman v. Madigan, C-70 1911, filed Sept. 8, 1970, wherein this court inquired extensively into conditions existing in the Greystone section of Alameda County Rehabilitation Center at Santa Rita.

Rockefeller, 312 F.Supp. 863 (S.D.N.Y.1970;[2] Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y.1970); Kritsky v. McGinnis, 313 F.Supp. 1247 (N.D.N.Y. 1970); Rodriguez v. McGinnis, 307 F.Supp. 627 (N.D. N.Y.1969). In short, it is now well settled that federal courts have jurisdiction under 42 U.S.C. § 1983 to examine into conditions at state prisons when allegations of unconstitutional deprivations are made.

I. PROCEDURAL CONSIDERATIONS

At the hearing, defendants argued that plaintiffs had not exhausted their state remedies and that this case is a proper case for convening a three-judge court pursuant to 28 U.S.C. § 2281. In their post-hearing brief they have further argued that this court should abstain from deciding the issue. None of these contentions has any merit.

A. Exhaustion of State Remedies

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." McNeese v. Board of Education, 373 U.S. 668, 674, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), quoting from Judge Murrah's decision in

[2]This case has been reversed in part on appeal, Sostre v. McGinnis, 442 F.2d 178 (2 Cir., 1971) (en banc). For reasons more fully set out in footnote 9, this court is not persuaded by the majority's decision on the due process issues involved. However, even in reversing the District Court, the Second Circuit recognized the appropriateness of federal court intervention in such matters.

Stapleton v. Mitchell, 60 F.Supp. 51 (D.Kan. 1945).

With these lines, the Supreme Court laid to rest any doubt that might have remained regarding the vitality of the exhaustion doctrine in actions brought under the Civil Rights Act. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1967), actually established this position two years prior, but it took *McNeese* to seal the lid on the coffin of exhaustion. Since that time, federal courts have leapt headlong into the adjudication of prisoners' rights in suits brought under the Civil Rights Act, as the cases cited throughout this opinion indicate. At this stage of the development of prisoners' rights under the Constitution, it would be unwise and inappropriate for this court to return to a doctrine designed to promote harmonious relations between sovereigns, at the expense of the timely adjudication of human rights.

B. No Three-Judge Court is Required in this case

When a federal court is asked to enjoin the enforcement of a state statute or regulation of statewide application, 28 U.S.C. § 2281 requires the convening of a three-judge court. But when the practice challenged is not of statewide application, a three-judge court is not required. Thus, in Hatfield v. Bailleaux, 290 F.2d 632, 635 (9th Cir. 1961), the Ninth Circuit held that a three-judge court was not required in a case challenging an Oregon prison regulation, even though the challenged regulation had been promulgated pursuant

to authority conferred by statute, and had subsequently been approved by the Oregon State Board of Control as required by that statute.

Similarly, in Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968), the court held that a three-judge court should be convened to hear a challenge to a state regulation establishing rules to be followed in every prison in the state, but stated that a challenge to certain prison practices at San Quentin which were not statewide in application was not properly a subject of three-judge court jurisdiction.

Plaintiffs in the case at bar are not challenging the constitutionality of any rule or regulation of statewide application. The only state regulations which are even arguably relevant, the Director's Rules and Inmate Classification Manual, neither mandate the specific procedures challenged here nor prohibt the procedures requested by the plaintiffs. In short, no state regulations speak to the subject at all, and their validity is not an issue in this case.

At the hearing of this case the Attorney General argued that, once approved by the Director of Corrections, the San Quentin Institution Plan became equivalent to a state regulation. That precise theory was considered and rejected by the Court in Hatfield v. Bailleaux, *supra*. Moreover, it is contradicted by the language of Director's Rule 4502 which, by requiring each institution to prepare an inmate disciplinary plan, clearly contemplates diversity of practice among the several prisons of the state.

For these reasons, 28 U.S.C. § 2281 has no application to this case and is no bar to a single judge reaching the merits of plaintiffs' claims.

C. The Abstention Doctrine Does Not Apply

The doctrine of abstention—that is, a decision by a federal court not to decide a case properly within its jurisdiction—is limited to certain circumstances. Federal courts have abstained from deciding constitutional questions properly before them (1) to avoid decision of a federal constitutional question when the case may be disposed of on questions of state law; (2) to avoid needless entanglement in complex state regulatory schemes; and (3) to allow the state courts an opportunity to give constitutionally questionable statutes saving constructions, when an expeditious state remedy is available. None of these circumstances are present in this case.

(1) *Avoidance of a federal constitutional question: The Pullman Doctrine.* Under this doctrine federal courts abstain from reaching constitutional questions if a case also contains a question of state law which, in itself, may dispose of the litigation. In the case after which the doctrine was named, Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), plaintiffs, in a federal action, sought an injunction against the enforcement of an order of the State Railroad Commission on the grounds that it denied fourteenth amendment rights and that under Texas law the Commission lacked the authority to issue the challenged order. Although a

federal court had the power and authority to decide either or both questions, the Supreme Court held that the district court should not resolve the constitutional question, since the case could be disposed on state law grounds; and furthermore it should not decide the state law issue since such a decision should more properly be made by a state court.

Clearly, this case is not controlled by *Pullman*, as there are no issues of state law which can dispose of the case without need of reaching federal constitutional questions.

(2) *Avoiding needless entanglement with complex state regulatory schemes: The Burford Doctrine.* Under this second type of abstention, federal courts have refrained from interfering with complex state regulatory schemes. In Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the Court held that the district court should have dismissed the complaint in a case involving proration orders in Texas oil fields, on the ground that the issues involved a specialized aspect of a complicated regulatory system of local law, which should be left to the local administrative bodies and courts.

This exception does not apply here because (1) the administrative process involved here "is the antithesis of a 'complex system'." Carothers v. Follette, 314 F. Supp. 1014, 1019 (S.D.N.Y.1970); and (2) the only basis for decision here is that the prisoners' federal constitutional rights have been violated, and state courts having no special expertise in deciding this

issue would be required to apply federal constitutional standards; "to abstain, therefore, would merely be to postpone the inevitable." *Carothers, supra.* As the Second Circuit said in declining to abstain in a similar situation,

> "We are not dealing here with the administration of a complex state process under which state courts have greater expertise. The actions here are not entangled in state law. Rather the only issues here are whether certain HA procedures pass muster under the due process clause of the Fourteenth Amendment to the federal Constitution. Federal courts are fully competent to consider such issues and are a primary forum for vindicating federal rights." Escalera v. New York City Housing Authority, 425 F.2d 853, 865 (2d Cir. 1970), cert. denied, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970).

Accord, Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1969); Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970); Klim v. Jones, 315 F.Supp. 109, 118 (N.D.Cal.1970) (Levin, J.).

(3) *Allowing state courts to save constitutionally questionable statutes.* This type of abstention is clearly not appropriate here. It is reserved for those cases involving vague or overbroad statutes which may be construed so as to avoid their constitutional infirmity. Here, there is no question as to the meaning or scope of the regulations. They must either stand or fall as written, and no interpretation by a state court can perserve them if they are facially unconstitutional. *See* Zwickler v. Koota, 389 U.S. 241, 251, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); McNeese v. Board of Edu-

cation, 373 U.S. 668, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963).[3]

II. DISCIPLINARY PROCEDURES AT SAN QUENTIN

A. Procedures Employed

The San Quentin Prison Institution Plan for the Administration of Inmate Discipline (the "Institution Plan") establishes the procedures to be followed in all cases in which inmates are charged with violating prison rules. It provides that when an employee believes an inmate's conduct seriously violates some prison rule, the employee is required to report the facts in writing on Form CDC-115. In some cases, the Form 115 may be supplemented by additional reports, but these are not required. Accused inmates are not permitted to see either the Form 115 or any supplementary reports. In serious cases, prisoners may be moved to isolation cells immediately after the alleged infraction and may be held there for up to seven days before adjudication by a disciplinary committee. Within a day after placement in isolation, the inmate will be seen by an officer of the "Unit Disciplinary Hearing Court." This officer is supposed to "inform the inmate of the charges placed against him, receive his plea of

[3]The recent United States Supreme Court decisions are inapplicable here. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and the companion cases decided that day involved federal court interference with ongoing state criminal prosecutions and were based on traditional notions of federalism and judicial economy. Nothing in those decisions would lead this court to conclude that federal courts must abstain from deciding civil cases equally cognizable in state courts although not yet instituted. Such an interpretation would reintroduce the exhaustion doctrine into civil rights actions, a procedure certainly not intended by the Supreme Court in the *Younger* decisions.

guilty or not guilty, and * * * carefully weigh the evidence against him." As a result of this adjudication, the officer may himself impose a penalty, but "serious" cases must be referred to the Unit Disciplinary Subcommittee. If such a referral is made, the officer is required to serve the inmate with a CDC Form 263 Notice of Complaint. These notices are required to state simply the charge number and title (*e. g.*, "Inmate Behavior D1201") but need not describe the particular act of misbehavior which may be charged in the Form 115.

Section ID-III-08 of the Institution Plan establishes three categories of disciplinary infractions: "administrative", "disturbance" and "major". These categories are used as a guideline for the Hearing Officer in deciding whether referral to the disciplinary subcommittee should be made, but any "serious" case may be referred regardless of the category in which it falls. The list of infractions does not purport to be complete. The acts enumerated are merely "examples" of what might be punishable.[4]

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[4]Section ID-III-08 states that "administrative" offenses are those "of a minor nature where no serious threat to Institution security is involved." Examples include "non-serious contraband," "disobeying orders," failure to comply with routine requirements like haircuts, "belligerent attitude or abusive language" and gambling.

"Disturbance" offenses are those "which can or have threatened the good order of the Institution, but are not of major importance." They include "fighting," "threatening employees," "conduct which could lead to violence", "unlawful gatherings," "Immorality," use of intoxicants, deliberate destruction of state property up to $100 and possession of contraband. "Major" offenses include "all cases involving commission of a felony crime and/or seriously threatening the security and good order of the Institution." Examples are escape, homicide, "felonious assault" on staff or other inmates, possession of "dangerous contraband" such as narcotics or weapons, serious destruction of state property in excess of $100 and participation in a work stoppage or riot.

Each housing unit at San Quentin has a disciplinary committee which meets once a week. It may hear from five to 15 cases per week, but the average is about seven cases. Three officers sit on the committee. There is no rule prohibiting a staff member who was involved in the incident from serving on the committee, although the practice is to avoid this whenever possible. Generally, the unit Hearing Officer is also a member of the committee.

The instructions regarding "adjudication" are identical to those given Hearing Officers. They merely state that the committee should "inform the inmate of the charges against him, receive his plea of guilty or not guilty, and carefully weigh the evidence. Effort will be made to uncover the basic cause(s) underlying the infraction." There are no other procedural directives of any kind in either the Classification Manual or the Director's Rules, or the San Quentin Institution Plan.

If a felony charge is involved, the inmate is advised of his constitutional right to remain silent and to have an attorney present during interrogation; he is specifically advised that anything he says "can and will" be used against him in a court of law. However, if the inmate requests an attorney, he is told he cannot see one until such time as the district attorney interviews him. If he chooses to exercise his right to remain silent lest he say anything which may be used against him in a criminal case, the committee nevertheless proceeds to adjudicate the disciplinary infraction, relying solely on the written reports filed against him.

The committee obtains the Form 115 and any supplementary material in advance of the meeting at which the charges are to be adjudicated. The prisoner is not permitted to see the Form 115 even when he appears before the disciplinary committee; but it is read to him by the committee chairman. In some cases, but not all, there may be supplemental reports on the incident, and the "gist" of these may be summarized for the inmate. Neither the author of the Form 115 nor the writers of these reports nor any other witnesses are present. The inmates are not entitled to call witnesses or to confront the persons who prepared the reports against them. They are not entitled to the assistance of either a lawyer, a staff member, or another inmate who might help them to present a defense to the charges. Neither the Director's Rules nor the Institution Plan specifies whether inmates may or may not have these procedural rights, but as a matter of invariable practice these rights are denied. In addition to the written reports, the committee's decision may be influenced by oral information "passed on" by other inmates. There is no requirement that the decision be based on evidence adduced at the hearing.

At the hearing, after a brief discussion of the incident, the inmate leaves the room. Most of the time spent by the committee in deliberation is devoted to deciding what disposition to take rather than in ascertaining guilt or innocence. Mr. Apostol knew of no case where the committee's decision had been less than unanimous. He estimated that about ten to 15 percent of all disciplinary charges resulted in acquittal, with

a lower percentage in the "major" category (adjudicated by the disciplinary committees) than in the "administrative" category (decided by the Hearing Officer). There is no requirement that the inmate be found guilty beyond a reasonable doubt, or even that the decision of the committee be based on substantial evidence. No rule states what the standard of proof should be.

Section ID-III-06 of the Institution Plan requires one member of the committee to record the "factors that substantiate the findings" of the committee. Mr. Apostol explained that no effort is made to compile a detailed record of the evidence. The notations made on the face of Form 115 comprise the entire record of the proceeding. The only items which must be recorded on the Form 115 are the title of the rule the accused is charged with violating, the name of the complaining officer, the inmate's plea, the committee's finding, and the disposition ordered.

The Form 115, along with any supplemental report that may have been prepared, constitutes the record which is forwarded for review by the Associate Warden, Custody, for his approval of the committee's action.

Mr. Apostol testified that if the inmate were dissatisfied with the committee's action, he could write to the Associate Warden, Custody (who had already approved the action) requesting further consideration of the case. However, there is nothing in writing that informs inmates of this possibility of "appeal" and Mr. Apostol was unsure whether they are orally told

of it. There are no regulations establishing any appeal process.

B. Consequences of Disciplinary Proceedings.

The Director's Rules and the Institution Plan enumerate the punishments which may be imposed by a Unit Hearing Officer and the punishments which may be imposed only by a disciplinary committee. There are no guidelines for deciding which punishment should be imposed for any particular offense. Regardless of which category the violation falls within, the Hearing Officer or the disciplinary committee may order that any or all of the authorized punishments be imposed.

Section ID-II-05 of the Institution Plan authorizes a Unit Hearing Officer acting alone to take one or more of the following actions: dismissal; warning; reprimand; temporary loss of one or more privileges; one or more weekend lock-ups; assignment to special work detail; confinement to quarters not to exceed 30 days; insolation suspended for a six-month period; removal from Honor Unit status; referral to disciplinary committee; and recommendation that no action be taken by the Adult Authority on Parole/Discharge date status.

Section ID-II-06 authorizes the disciplinary committee to take one or more of the following actions in any case it hears: dismissal; referral for further investigation; warning; reprimand; temporary or permanent loss of one or more privileges; confinement in an Isolation and/or Quiet Cell, usually with loss of

privileges also assessed; special isolation diet; confinement to cell; removal from assignment; assignment to Segregation status; recommendation to Adult Authority for appropriate action; recommendation to the Director of Corrections regarding forfeiture of earnings; assessment for damages when destruction of state property is involved; and appropriate change in custody. The consequences and impact of most of these is apparent from the description itself. Some of the more serious are described below.

(1) *Isolation*

The period of confinement in an isolation cell usually does not exceed 30 days. The committee has discretion to decide whether the isolation period is to be spent in a regular cell, a "quiet" cell, or a "strip" cell. All three types are found in the isolation wing of the prison. A regular isolation cell is 5 feet by 9 feet, concrete construction, with a barred door; it is furnished with a cot, a sink and a toilet. The light is not controlled by the inmate. The bed has a metal plate instead of a spring. A "quiet" cell has a vestibule and solid door, which may be closed and is furnished with a concrete slab and 1-inch mat in place of the usual cot. A "strip" cell is furnished with an "oriental toilet" (hole in the floor) in place of regulation plumbing.

A prisoner in isolation spends at least 23 hours a day in his cell, being permitted to leave only for a brief period each day, when he may walk up and down alone in the narrow passageway in front of his cell.

If the disciplinary committee orders that the prisoner be kept on "cell status" he remains in his cell 24 hours a day, without even the brief respite otherwise permitted for exercise. The exercise period may also be denied if the inmate's conduct while in isolation is considered improper. Prisoners in isolation eat their meals alone in their cells. They have only vocal contact with other prisoners who may be in isolation, whom they cannot see except during the exercise period. A special restricted diet may be imposed by the disciplinary committee.

Prisoners are strip searched and all of their personal property is taken from them when they are admitted to isolation. They are not permitted books, magazines, newspapers, or radios, but law books may be ordered from the prison library if needed. No work, study or recreational activity is permitted. The prisoner is forced to spend his day in total idleness. Smoking is not permitted nor is the purchasing of canteen items. Mail is limited to the immediate family, attorney of record, courts and public officials.

(2) *Adjustment Center or Segregation*

One of the most serious actions which can be taken by the disciplinary committee is to assign the prisoner to Segregation status, or change his custody to maximum, which means that thereafter he will be housed in the Adjustment Center. Although confinement in "isolation" is ordinarily limited to 30 days, assignment to Segregation or to the Adjustment Center is for an indefinite period of time. Once assigned to the Adjust-

ment Center, a prisoner may remain there for the duration of his sentence.

There is very little difference between "isolation" and the Adjustment Center. Adjustment Center inmates are compelled to spend their days in idleness, confined to their cells 23 hours a day, 7 days a week. None of the ameliorative programs provided for the general prison population are available to them. Because they are not permitted to work, they lose even the meager wages with which they could make minor purchases at the canteen. They cannot enroll in vocational training programs or attend school. They are barred from church services, movies, television and all other forms of recreation and entertainment which might help to relieve the monotony of prison life.

The cells in which Adjustment Center inmates live and eat their meals are of concrete box construction, the same as the isolation cells, approximately 5 feet by 9 feet, with barred doors. There is neither fresh air nor natural light. The ceiling light is not controlled by the inmate. The entire furnishings of the cell consist of a cot, a sink and a toilet. Institution rules prohibit decorating the walls of the cell.

Adjustment Center inmates are permitted to leave the cell for exercise an hour a day but not all are allowed outdoors. Those who are allowed outdoors must submit to a complete strip search, including rectal examination, both before and after. Outdoor exercise takes place in a walled yard connected to the housing unit, not in the general population yard. Adjustment Center inmates are not permitted to use the gym-

nasium or athletic equipment provided for the general population.

(3) *Referral to Adult Authority and Effect on Parole Consideration*

In the federal prison system, as well as that of most states, a practice of granting good-time credits is employed. Under this procedure, defendants are sentenced by the sentencing judge to a fixed period of time. They, of course, may be paroled prior to the date originally set by the judge. In addition, prisoners "earn" good-time credits for good behavior which goes to reduce the actual maximum term of imprisonment.

In jurisdictions that maintain this system, disciplinary committees may forfeit prisoners' good-time credits as punishment for violation of prison rules. In these jurisdictions, elaborate procedural safeguards must be followed before a prisoner's good-time credits may be forfeited.[5]

While California used to be among the states with such a scheme, it is no longer. In California, under the Indeterminate Sentence Law, Cal.Pen.Code, §§ 1168, 3020 and 5077, criminal offenses carry statu-

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[5] *See* Sostre v. Rockefeller, 312 F.Supp. 863 (S.D.N.Y.1970); Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y.1970); Kritsky v. McGinnis, 313 F.Supp. 1247 (N.D.N.Y.1970); Rodriguez v. McGinnis, 307 F.Supp. 627 (N.D.N.Y.1969). Indeed, before California adopted the indeterminate sentence procedure, it had a good-time credit scheme; and prisoners facing the loss of these credits as a result of disciplinary proceedings were entitled to present evidence and call witnesses on their own behalf. Cal.Pen. Code, § 2924.

torily prescribed punishments with a minimum and maximum term. Sentencing judges sentence convicted defendants to "the term prescribed by law" which is measured by these statutory minimums and maximums. Each year, a prisoner's case comes before the Adult Authority, at which time the Adult Authority may do one of three things. It may "continue" consideration until the following year, it may set a maximum sentence the prisoner will have to serve, or it may set a release date (parole) once a maximum has been set. In other words, the actual time an individual inmate must serve is decided by the Adult Authority at its complete discretion.

Needless to say, an inmate's prison behavior is a key factor in the Adult Authority's decision making process. Currently, Resolution No. 216 (6/5/64) of the Adult Authority requires that a report of all disciplinary actions be presented to the Adult Authority at the time it considers the fixing of sentence and parole date. While a disciplinary proceeding cannot result in loss of good-time credits—since there are no good-time credits in California due to the internal inconsistency of earning credits against an indeterminate sentence—it is obvious that disciplinary action taken against a prisoner and reported to the Adult Authority can and does have an adverse effect on the length of his sentence, parallel to the loss of good-time credits in other jurisdictions.

If the disciplinary committee finds an inmate guilty of a disciplinary offense occurring after the Adult Authority has set his sentence and parole date, the

offense must be reported to the Adult Authority for immediate action. A single disciplinary offense is sufficient cause for the Adult Authority to rescind the parole release order and reset the prisoner's sentence at the statutory maximum; and the disciplinary committee is authorized to recommend that the Adult Authority rescind the parole date.

(4) *Assessment of Damages or Recommendation Regarding Forfeiture of Earnings*

If the violation consists of destruction of state property, the disciplinary committee may levy upon earnings—both accumulated and future—for payment of the repair costs. The amount involved would vary significantly depending on the property allegedly destroyed.

In any other type of offense adjudicated by the disciplinary committee, it can recommend to the Director of the Department of Corrections that any wages be forfeited as in the nature of a fine. It is then up to the Director to determine if such a forfeiture is appropriate, and if so, how much should be forfeited.

III. MIRANDA IN THE PRISON

One important aspect of the procedures outlined above can be disposed of on traditional notions of due process and the protections provided by the fifth and sixth amendments, without reaching the more difficult problem of due process requirements in disciplinary hearings generaliy.

As described above, the procedures employed when a prisoner is charged with an offense which may be referred to the district attorney for prosecution as a felony suffers from serious constitutional infirmities —more serious even than those delineated by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

This procedure provides that in such instances, when the prisoner is brought before the disciplinary committee he is told that his case may be referred to the district attorney, and is then given the standard *Miranda* warnings, including his various rights with respect to remaining silent, his rights to counsel, and the fact that anything he says at the *disciplinary hearings* may and will be used against him at his subsequent trial. Should he then ask for the assistance of counsel, either retained or appointed, he is told that this right attaches *only* when he is questioned by the district attorney. Should he choose to remain silent, pursuant to his rights as delineated in the warning and in furtherance of those rights, the disciplinary committee nonetheless proceeds to adjudicate his case. Should he desire to make a statement in his own behalf, for example, a statement that he did do the act with which he is charged but the circumstances were such as to mitigate his disciplinary punishment, he does so at the peril of having his "confession" admitted as evidence in a state prosecution.

In *Miranda*, the Supreme Court held that a custodial interrogation by police officers is inherently coercive and thus an accused must be fully apprised of

his rights prior to any such questioning. Furthermore, if, at any time during such questioning he wished to exercise any of his rights, the questioning must stop and those rights must be afforded. In a *Miranda* situation, the only consequences of the accused's exercising his right to remain silent are that the police stop asking him questions.

In a situation involving a prisoner before the disciplinary committee, indeed in the very case of named plaintiff Clutchette, the coercive nature of the questioning, while perhaps more subtle than that in *Miranda,* is also more devastating. The prisoner, warned that anything he says may be used against him in a criminal prosecution, is put to the choice between remaining silent and sacrificing his right to defend himself before the committee, or speaking to the committee and risking incriminating himself in a future prosecution. The trap is unavoidable. Not only does he risk multiple punishment for the same act—a practice not challenged here but one which may, in light of recent Supreme Court decision, pose some constitutional questions—he definitionally prejudices himself in one proceeding by acting in his best interests in the other.

For this reason, it is imperative that a prisoner be afforded counsel, not a counsel-substitute, when he is charged with a prison rule violation which may be punishable by state authorities. In such a position, the prisoner is put in a serious dilemma not faced by an accused in a normal *Miranda* situation, and counsel is required, for reasons more compelling than

those present in *Miranda,* to protect his constitutional rights.[6]

Furthermore, irrespective of anything expressed later in this opinion, the situation described requires the imposition of additional safeguards. As indicated above, accused prisoners have no right to cross-examine persons who submit the Form 115 or any supplemental reports reciting accusatory facts. Likewise, they have no right to call witnesses in their own behalf or even submit written reports from witnesses in their own behalf.

Whatever the decision ultimately reached by this court or any appellate court on a prisoner's right to affirmatively defend himself in normal disciplinary hearings, it is clear that when he is charged with an offense for which state criminal proceedings may be instituted, and is warned that he has a right to remain silent and that anything he says may and will be used against him in such a proceeding, a prisoner cannot be compelled to sacrifice his only defense in order to exercise his equally compelling constitutional right to remain silent.

In any proceeding in which an accused party exercises his right to remain silent, he naturally sacri-

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[6]Nothing in the recent Supreme Court decision of McGautha v. California, 401 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), alters this position. As the Court said in *McGautha:*

> "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha, supra* at 213, 91 S.Ct. at 1470.

What today's order requires is not that prisoners be permitted to circumvent the choice between two conflicting constitutional rights, but only that they be provided with counsel to help them make the choice.

fices one means of defense. In the normal criminal prosecution, or civil-criminal combination, we are not troubled by this sacrifice, as the defendant is protected by many procedural safeguards, and retains the alternative of defending himself by means of calling and cross-examining witnesses. In a disciplinary proceeding, prisoners are not protected by these same procedural safeguards, i. e., a presumption of innocence with the burden of proof beyond a reasonable doubt on the state. Furthermore, should the charged prisoner choose to exercise his right to remain silent, he is stripped of any possible means of defense. The choice thus put to him of sacrificing one fundamental right as a price for exercising another is repugnant to our notions of due process. United States v. Jackson, 390 U.S. 570, 581-585, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); Simmons v. United States, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).[7] Therefore, irrespective of or in addition to any arguments regarding a prisoner's right to call witnesses in his own behalf and cross-examine witnesses against him in disciplinary hearings generally, when the offense charged may be referred to the district attorney for prosecu-

[7] Again, *McGautha* in no way vitiates this conclusion. A major factor in the decision not to compel a separate penalty trial in capital cases, despite the "tension" between petitioner's right to remain silent on the issue of guilt and the right to present mitigating testimony to the jury on the issue of punishment, was the fact that a defendant's counsel, through oral argument, could still present this data to the jury. Here, absent any right to establish a defense or test the authority's case, a prisoner who exercises his right to remain silent forfeits *any possible* defense to the charges. *See also* n. 20, 401 U.S. at 217, 91 S.Ct. at 1472 of *McGautha* for a suggestion that the absence of the procedural rights required by this opinion and order might have had a very substantial effect on the result reached in *McGautha*.

tion in state courts, prisoners must be afforded these rights so as to maintain the integrity of their fifth amendment right to remain silent.

IV. DUE PROCESS GENERALLY

Whatever the state of the law regarding procedural due process prior to 1969, the Supreme Court's decision that year in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1969), delineated its perimeters clearly for future proceedings. Holding that before welfare benefits may be terminated, the agency must conduct an adversary proceeding with all the elements of due process incident thereto, the Court dispelled any lingering remnants of the theory that procedural due process was only required when some "vested right" was being impaired. To that end, the Court said:

> "Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."' Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, [89 S.Ct. 1322, 1327, 22 L.Ed.2d 600] (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398, [83 S.Ct. 1790, 10 L.Ed.2d 965] (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513, [78 S.Ct. 1332, 2 L.Ed.2d 1460] (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551, [76

> S.Ct. 637, 100 L.Ed. 692] (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, [71 S.Ct. 624, 95 L.Ed. 817] (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union, etc., v. McElroy, 367 U.S. 886, 895, [81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230] (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 363 U.S. 420, 440, 442, [80 S.Ct. 1502, 1513-1514, 4 L.Ed.2d 1307] (1960)." Goldberg v. Kelly, supra at 262-263, 90 S.Ct. at 1017-1018.

Measured against this reasoning, the argument that a state prisoner is committed to the custody of the Department of Corrections and as such may be confined in any manner chosen by the Director, subject only to statutory guidelines and the proscriptions of the "cruel and unusual punishment" clause of the eighth amendment, is unpersuasive. It is based on the theory that "custody is custody," regardless of how it is carried out, and that a prisoner suffers no real loss or gain when the nature of his custody is changed. This court has already implicitly rejected this theory in Ellhamer v. Wilson, 312 F.Supp. 1245 (N.D.Cal.

1969); Wilburn v. Nelson, 323 F.Supp. 585 (N.D. Cal.1970); Mays v. Nelson, 323 F.Supp. 587 (N.D. Cal.1970). While prisoners may have no vested right to a certain type of confinement or certain privileges, it is unrealistic to argue that the withdrawal of those privileges they do have, or the substitution of more burdensome conditions of confinement would not, under their "set of circumstances," constitute a "grievous loss." As the Fifth Circuit Court of Appeals has stated:

> "[A]ny further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968).

The very regulations under attack in this case implicitly recognize that these changes in status are significant losses of already limited comforts, and not simply "administrative changes," since they are held out as punishment for violation of prison rules.

The very real and substantial danger of an increased term of imprisonment by reason of a referral to the Adult Authority is a grievous loss, as is confinement in some form of maximum security accompanied by the loss of privileges or the loss of income, past or future. While some of these punishments may, on the surface, appear to be mere "slaps on the wrist", for a prisoner who will, by this punishment, suffer the loss of those privileges intended to relieve him from the otherwise routine existence of prison life, money saved to purchase personal items,

or the possibility of an accelerated release date, such acts are highly punitive. Outside the prison gates, proceedings resulting in far less punitive consequences must be attendant with elements of due process.[8]

Thus, as a general proposition, there are at least some instances when the severity of the potential punishment compels the imposition of some elements of procedural due process on prison disciplinary hearings. When such procedures are required, and the extent to which they are required are explored below.

Procedural due process must obtain whenever the individual is subject to "grievous loss" at the hands of the state or its instrumentalities. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1969). This cannot be judged after the fact, in light of the punishment actually ordered, but must be based on the potential punishment that the disciplinary committee can require. Cf., Duncan v. Louisiana, 391 U.S. 145, 159-160, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The rules presently permit the disciplinary committee or a single hearing officer to impose the full range of potential punishments for violation of any prison rule.[9] Thus, since some of those punishments are serious enough, as defined by *Goldberg*, to require the imposition of procedural due process, these

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[8] *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) (placing name on list of chronic drunks); Jones v. Robinson, 440 F.2d 249 (D.C.Cir. 1971) (transferring patient accused of crime to maximum security section of hospital).

[9] As pointed out above, a hearing officer cannot impose all the penalties that the disciplinary committee can. However, he can impose punishment severe enough to warrant the requirements of procedural due process.

requirements must obtain in all disciplinary committee or hearing officer proceedings. This is not to say that prison officials could not develop specific criteria for imposing various punishments; for example, they might choose to establish a schedule of potential punishments for every offense, so as to know in advance whether or not the hearing may result in punishment which will require these due process safeguards.[10]

With this thought in mind, and without attempting to be either exhaustive or binding, the following situations are offered as instances in which the loss to the prisoner is sufficiently serious so as to require the imposition of procedural due process as delineated below:

(a) Violations punishable by indefinite confinement in the adjustment center or segregation;

(b) Violations, the punishment for which may tend to increase a prisoner's sentence; *i. e.*, those which must be referred to the Adult Authority;

(c) Violations which may result in a fine or forfeiture;

(d) Violations which may result in any type of isolation confinement longer than ten days;

(e) Violations which may be referred to the district attorney for criminal prosecution.

Should respondent prison officials choose to adopt this or some similar schedule rather than afford all prisoners charged with any violation the due process

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[10]As a matter of social policy and not constitutional law, this might be a more effective way to deter undesirable behavior.

safeguards set out below, this court would of course expect to review the schedule prior to its promulgation and for this purpose retains jurisdiction over this aspect of the proceedings.

V. REQUIREMENTS OF RUDIMENTARY PROCEDURAL DUE PROCESS

> "'[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Cafeteria & Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 895, [81 S.Ct. 1743, 6 L.Ed.2d 1230] (1961) * * *. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process." Goldberg v. Kelly, 397 U.S. 254, 263, 267, 90 S.Ct. 1011, 1018, 1020, 25 L.Ed.2d 287 (1969).[11]

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[11] It is around this language that this court must, with all due respect, take issue with the Second Circuit, and its decision in Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971) (en banc). In *Sostre*, the Court of Appeals recognized that disciplinary punishment constituted a "grievous loss" within the meaning of *Goldberg*. They framed their inquiry, however, into an analysis of what "process" is "due," and concluded that the requirements set out by the district court, which were similar to those set out here, were more than that required by the due process clause. In light of the quoted portion of *Goldberg*, in which the Supreme Court held that the requirements it was about to set out (requirements this court is now adopting as applicable to disciplinary hearings) did not extend "beyond those demanded by rudimentary due process," it is difficult to understand the conclusion that something less is constitutionally adequate.

With this introduction, the Supreme Court proceeded to clearly establish what is demanded by rudimentary due process.

A. Notice

In *Goldberg,* the Court said that rudimentary principles of due process "require that a recipient have *timely* and adequate notice *detailing the reasons* for a proposed termination * * *." *Goldberg, supra,* at 267-268, 90 S.Ct. at 1020 (emphasis supplied). Specifically, it approved the 7 day notice requirement and the substance of the notice which "inform(s) a recipient of the *precise questions* raised about his continued eligibility." *Goldberg, supra* at 268, 90 S.Ct. at 1020 (emphasis added).

In the present context, both the form and procedure of the notice given are constitutionally infirm. Those cases currently heard and decided by the hearing officer have no real provision for notice. The procedure simply requires that several days after the alleged offense the hearing officer shall approach the prisoner, advise him of the charge, take his statement and plea and adjudicate the case. While this may be adequate in some cases, it is clearly inadequate when serious punishment may result.[12]

If the hearing officer concludes that the case is a proper one for the disciplinary committee to hear, he subsequently "serves" the prisoner with a Form 263

[12]At present, hearing officers may impose a broad range of punishments, from mere warning to 30 days cell status or recommendation that the Adult Authority take no action on fixing a parole date.

Notice of Complaint. This notice is constitutionally defective in two ways. First, since all that is required to state is a rule number and name, it does not adequately apprise the prisoner of what he is accused of having done. Second, hearings are held every week at which time all cases arising during the week are heard. Thus, the maximum amount of time a prisoner would have to prepare his case is 7 days; the minimum is overnight.

While *Goldberg* did not establish constitutional minimums, it seems clear that to satisfy constitutional requirements, notice of at least 7 days of any charge requiring procedural due process, whether heard by a hearing officer or disciplinary committee, is the minimum acceptable period. Furthermore, to constitute meaningful notice, at least a brief statement of the facts upon which the charge is based, as well as the name and number of the rule allegedly broken must be included. Absent these, an accused prisoner is without sufficient time or information to prepare any defense on the merits.[13]

B. Witnesses

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E. g., I.C.C. v. Louisville & N.R. Co., 227 U.S. 88, 93-94, [33 S.Ct. 185,

[13]Nothing in this or any other portion of this opinion and order is intended to suggest that prison officials cannot immediately place in isolation those charged with violating prison rules or anyone whose continued "freedom" poses an immediate threat of violence or disruption, provided of course that the officials thereafter proceed expeditiously to hold an appropriate hearing.

57 L.Ed. 431] (1913); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-104, [83 S.Ct. 1175, 10 L.Ed.2d 224] (1963)." Goldberg v. Kelly, *supra* at 269, 90 S.Ct. at 1021.[14]

The San Quentin Prison Rules provide that all "testimony" take the form of written reports by witnesses. Not only are the authors of these reports unavailable for personal examination, the reports themselves are not shown to or even read to the accused. This clearly misses, by a wide mark, the fundamental principles of due process required in *Goldberg*. Prisoners must be given the right to call witnesses in their own behalf and cross-examine witnesses against them.[15]

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[14]The Court went on to quote from Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959):

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny."

[15]The recent case of Richardson v. Perales, 401 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), in no way diminishes the thrust of *Goldberg*. In *Perales*, the Court distinguished *Goldberg* on the ground that, among other differences, the Social Security Act allowed claimants to subpoena doctors submitting adverse reports for the purposes of eliciting direct testimony subject to cross-examination. Neither the procedures considered in *Goldberg*, nor those involved herein provide for such testimony.

C. Counsel

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), quoted in *Goldberg, supra,* 397 U.S. at 270, 90 S.Ct. at 1022. Under the present set of rules, prisoners are not entitled to the assistance of retained or appointed counsel or counsel-substitute. Rudimentary principles of due process require the presence of counsel when the rights of an individual are seriously threatened by governmental action. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1969). Elements of equal protection demand that when the prisoner is indigent, the state must provide him with counsel. *Cf.,* Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Recently, the Supreme Court has held that in some instances counsel-substitute will be acceptable. Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969). While only counsel is acceptable in the case of an offense which will be referred to the district attorney, in all other cases prison officials should not be precluded from providing an adequate counsel-substitute.

D. Decision Based on the Evidence

> "[T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. P.U.C., 301 U.S. 292, [57 S.Ct. 724, 81 L.Ed. 1093] (1937); United States v. Abilene

> & S.R. Co., 265 U.S. 274, 288-289, [44 S.Ct. 565, 68 L.Ed. 1016] (1924). To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. P.U.C., 260 U.S. 48, 57-59, [43 S.Ct. 51, 54-55, 67 L.Ed. 124] (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." Goldberg v. Kelly, *supra* 397 U.S. at 271, 90 S.Ct. at 1022.

Rules of evidence, as a general proposition, do not rise to constitutional levels. Thus, it would be inappropriate for this court to establish a "weight of the evidence" rule more stringent than the due process clause requires. When reviewing a disciplinary committee decision in a suit brought under 42 U.S.C. § 1983, district courts have traditional standards to review decisions for arbitrariness. It is hoped, although not constitutionally compelled, that disciplinary committees will apply a "weight of the evidence" rule somewhat more exacting.

E. Decision by an Unbiased Fact-finder

> "[O]f course, an impartial decision maker is essential. *Cf.* In re Murchison, 349 U.S. 133, [75 S.Ct. 623, 99 L.Ed. 942] (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46, [70 S.Ct. 445, 94 L.Ed. 616] (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review." Goldberg v. Kelly, *supra* at 271, 90 S.Ct. at 1022.

Under the present system, there is no prescription against the participation in the decision by one involved in the incident, although such a practice is discouraged. It is difficult in the abstract to establish a fixed rule regarding participation by involved parties, particularly in light of the above-quoted language. But such a rule must be fixed. It follows that if participation by involved parties is, in some instances acceptable, in others it is not. To preclude a multitude of individual challenges, a uniform policy consistent with due process requirements must be established and applied in every case. Such a policy must be framed so as to preclude, in all cases, the participation in any aspect of the decision of the disciplinary committee of any one charged with a subsequent review of that decision, or anyone with personal knowledge of any material fact relevant to the decision. Only through such a policy can complete impartiality be insured in all cases.

F. Right to Appeal

The status of a right to appeal a decision of the disciplinary committee is unclear. It appears that while such a right exists, its existence is not uniformly known, and only irregular, individual efforts to make it known occur.

There is no constitutionally protected right to appeal the decision of a fact-finding tribunal. However, if statutes or regulations provide for an appeal of right, the equal protection clause requires that all those affected be treated alike. *See* Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811

(1963). Thus, officials cannot rely on word of mouth to notify prisoners of their right to appeal or the procedures for such an appeal. Nor can they notify some prisoners at the conclusion of disciplinary proceedings and fail to notify others. The equal protection clause contemplates uniform treatment of all prisoners.

Now, therefore, it is ordered, adjudged and decreed that:

1. The above memorandum opinion constitutes the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a);

2. Plaintiffs are hereby granted a declaratory judgment with respect to their first cause of action insofar as this opinion and order declare that the disciplinary procedures employed at San Quentin Prison violate the due process and equal protection clauses of the 14th amendment by failing to provide for adequate notice of charges, the calling of favorable witnesses and cross-examination of accusing witnesses, counsel or counsel-substitute, a decision by a fact-finder uninvolved with the alleged incident, a written finding of facts, or uniform notice of any right to appeal the decision, when such a disciplinary hearing may result in grievous loss to the prisoner; and that certain disciplinary punishment, including but not necessarily limited to (a) indefinite confinement in the adjustment center or segregation; (b) possible increase in a prisoner's sentence by reason of referral of the disciplinary action to the Adult Authority; (c) a fine or forfeiture of accumulated or future earn-

ings; (d) isolation confinement longer than 10 days; or (e) referral to the district attorney for criminal prosecution, constitute such a grievous loss to the prisoner;

3. Defendants are hereby preliminarily and permanently enjoined from conducting any further disciplinary hearings at San Quentin Prison so long as the procedures employed are constitutionally infirm as set out above;

4. The decisions of the disciplinary committee in the disciplinary hearings of the named plaintiffs, Clutchette and Jackson, are set aside, and said plaintiffs shall be restored to the status of confinement they enjoyed prior to the institution of such proceedings, and such decisions shall be expunged from all their records, and shall not be referred to the Adult Authority;

5. Defendants are ordered to submit a plan for the conduct of disciplinary committee hearings, consistent with the opinion this day entered, to this court within 100 days for approval by this court; 10 days prior to this date of submission, defendants shall serve a copy of said plan to attorneys for plaintiffs;

6. Execution of this order is stayed, insofar as it enjoins any further disciplinary hearings and sets aside the decisions in any disciplinary hearings already held, for 30 days to allow the Attorney General of the State of California to file a notice of appeal, should he so desire. In the event that such a notice is filed, the above-described portion of this order is stayed until further order of this court.

United States Court of Appeals
for the Ninth Circuit

No. 71-2357

John Wesley Clutchette, et al.,
Plaintiffs-Appellees,
vs.
Raymond J. Procunier, et al.,
Defendants-Appellants.

[April 25, 1974]

Appeal from the United States District Court
for the Northern District of California

The opinion of the court is reported at 497 Fed.2d 809 and reproduced in the Supplemental Appendix to Petition for Writ of Certiorari.

United States Court of Appeals
for the Ninth Circuit

No. 71-2357

John Wesley Clutchette, et al.,
Appellees,

vs.

Raymond K. Procunier, et al.,
Appellants.

[October 21, 1974]

Appeal from the United States District Court
for the Northern District of California

The opinion of the court on rehearing is reported at 510 Fed.2d 613 and reproduced in the Appendix section of the Petition for Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-1194

J.J. ENOMOTO, et al.,

Petitioners,

vs.

ALEJANDRO R. FERREL, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, by their undersigned attorneys, hereby move pursuant to 53 of the Rules of this Court for leave to file the brief in Opposition To Petition For Certiorari without prepayment of costs and to proceed *in forma pauperis*.

The affidavits of respondent Alejandro Ferrel and William Bennett Turner in support of this motion are annexed hereto.

Dated: April 17, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

74-1194

J.J. ENOMOTO, et al.,

Petitioners,

vs.

ALEJANDRO R. FERREL, et al.,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

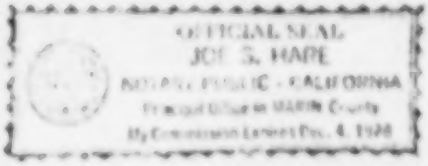
ALEJANDRO R. FERREL, being duly sworn, deposes and says:

1. I am a respondent in the above-entitled case, having been permitted to intervene as a party plaintiff in the district court by stipulation and order filed July 3, 1972. I make this affidavit in support of my motion for leave to proceed in forma pauperis.

2. Because of my poverty I am unable to pay the costs or fees in this case and am unable to give security therefor.

3. I believe in good faith that I am entitled to the redress sought in this case. The nature of the case is fully set forth in the decision of the Ninth Circuit and in the brief in Opposition to Petition for Writ of Certiorari submitted herewith. Briefly, the case involves the right of San Quentin prisoners like myself to be free of arbitrary punishments by

prison officials, and specifically involves the constitutionality of petitioners' disciplinary procedures.



Alejandro R. Ferrel
ALEJANDRO R. FERREL

Sworn to and subscribed before me,

this 21 day of March, 1975.

Joe S. Hape
Notary Public

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-1194

J.J. ENOMOTO, et al.,

Petitioners,

vs.

ALEJANDRO R. FERREL, et al.

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
)ss.
COUNTY OF SAN FRANCISCO)

WILLIAM BENNETT TURNER, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court. I am serving as an attorney for respondents in the above-entitled case. I make this affidavit in support of respondents' motion for leave to proceed in forma pauperis.

2. This case has been maintained as a class action on behalf of all prisoners confined at San Quentin Prison. The original named plaintiffs were John Wesley Clutchette and George Jackson. John Wesley Clutchette was released from prison. George Jackson is now deceased. Alejandro R. Ferrel was permitted, by stipulation and order filed in the district court on July 3, 1972, to intervene as a party plaintiff and representative of the class of San Quentin prisoners. Mr. Ferrel's in forma pauperis affidavit is submitted

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Petitioners,

vs.

ALEJANDRO R. FERREL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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J. J. ENOMOTO, et al.,

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vs.

ALEJANDRO R. FERREL, et al.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Alejandro R. Ferrel, et al. [1] file this brief in opposition to the petition for certiorari and pray that the writ be denied.

QUESTIONS PRESENTED

On the merits the questions presented to the courts below were:

1. Whether the consequences of disciplinary proceedings at San Quentin were sufficiently serious to require procedural due process safeguards against error or arbitrariness and, if so, whether San Quentin's disciplinary fact-finding procedures met rudimentary standards of due process.

2. Whether a prisoner accused of misconduct that also constitutes a crime, and whose case is referred to the

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1/ The original named plaintiffs were John Wesley Clutchette and George Jackson, suing on behalf of a class of San Quentin prisoners. By stipulation and order filed July 3, 1972, respondent Alejandro R. Ferrel was permitted to intervene as a party plaintiff and representative of the class. Since Clutchette and Jackson are no longer incarcerated, the style of the case should reflect that Ferrel is the named respondent before the Court.

district attorney for possible prosecution, may be subjected to disciplinary punishment without a hearing that provides safeguards of his Fifth Amendment privilege against self-incrimination, including the right to counsel.

STATEMENT OF THE CASE

The Petition does not adequately describe the present posture of this litigation.

The action was filed in 1970 and the initial decision of the district court was rendered June 21, 1971, on the basis of the evidence then before it. Clutchette v. Procunier, 328 F.Supp. 767 (N.D. Cal. 1971). Petitioners -- the defendant prison officials -- then appealed, but the appeal was not decided until April 25, 1974. Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974). Rehearing was held to consider the effect of Wolff v. McDonnell, 418 U.S. 539 (1974), and a modified opinion on rehearing was issued October 21, 1974. 510 F.2d. 613 (9th Cir. 1974). Rehearing en banc was denied on February 28, 1975.

During the lengthy appeal process, three events occurred which significantly affect whether this Court's certiorari jurisdiction should be exercised:

(1) The petitioner officials submitted a new and different disciplinary Plan to the district court and claimed that the Plan met the requirements of that court's decision. The Plan was first submitted on October 28, 1971. An amended Plan was filed on January 4, 1972, and another amended Plan was filed, after certain discovery by respondents, on May 15, 1972. After remand by the Ninth Circuit, a Second Amended Plan was filed on January 20, 1975, and is presently before the district court. Respondents have objected to certain aspects of the latest Plan, but the district court has not yet ruled thereon. None of the new plans was in the record before the Ninth Circuit (see 497 F.2d at 817, n. 11), and thus none is before this Court.

(2) As petitioners concede (Petition, p. 7), they voluntarily implemented a new disciplinary Plan shortly after the district court's decision. Moreover, they have now implemented a revised Plan (Appendix to Petition, pp. ix-xxviii) and have contended before the district court that it fully complies with due process requirements. Therefore, San Quentin has actually been operating under new disciplinary plans for more than three years. Petitioners have not, at least not yet, been ordered to do anything they are not doing voluntarily. If the district court rules that the Plan now before it is in any way deficient and requires modifications, petitioners may appeal from that order. Accordingly, the present petition is premature. Only when the district court enters a final order approving or disapproving the Plan can it be determined what is actually at stake on review.

(3) The evidentiary record on this petition is stale. The evidence on which the district court rendered its decision was presented in 1970 and involved an older disciplinary Plan that has now been discarded by petitioners. 2/ But in connection with the newer plans that have been submitted, both in 1972 and again in 1975, respondents have done a substantial amount of discovery relating to the actual operation of the plans. The results of this discovery have been presented as new evidence to the district court. New evidence was also submitted to that court by petitioners as recently as March 7, 1975. None of the new evidence is in the record on the instant petition. As mentioned above, the district court has not yet rendered a decision, on the basis of all the evidence presented, either

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2/ Petitioners do not contend, nor could they, that the old plan struck down by the courts below complies with the minimum due process specified in Wolff v. McDonnell, 418 U.S. 539 (1974).

approving or disapproving petitioners' Plan. When it does, the case will then be ripe for review.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioners seek a writ of certiorari on the ground that the Ninth Circuit has "unduly constrained the discretion" of prison officials recognized in Wolff v. McDonnell, supra (Petition, p. 6). Petitioners do not assert that there is any conflict between the circuits. We submit that certiorari should be denied because (a) the state of the record and the pendency of proceedings in the district court render inappropriate the exercise of this Court's certiorari jurisdiction, and (b) the decision sought to be reviewed is not in conflict with Wolff.

A. Exercise Of The Court's Certiorari Jurisdiction Would Be Inappropriate In The Present Posture Of This Case

As set forth in the Statement of the Case, there have been further proceedings in the district court since the order from which petitioners have appealed. While the appeal was pending petitioners submitted a new and different disciplinary Plan to the district court. Moreover, they voluntarily implemented such a Plan and San Quentin has now been operating under it for several years. Not only is the Plan not in the record which petitioners present for review, but substantial new evidence has been presented by both sides to the district court, and this evidence relates to the actual operation of the Plan in recent years. Finally, the district court has not ruled on the Plan as submitted, either approving it or disapproving it or ordering modifications. If the district court approves the Plan, as petitioners have urged it to do, review by this Court of the Ninth Circuit's decision would be entirely pointless; the Court would be asked to decide abstract questions and render an advisory opinion, because petitioners cannot legitimately

complain that they have been ordered to do anything they are not already doing voluntarily. 3/ If, on the other hand, the district court should disapprove any part of the plan and order modifications, there will be time enough for petitioners to appeal from such a final order and review could then proceed on the basis of a complete evidentiary record. This Court's certiorari jurisdiction should not be exercised on a stale record when the only live issues are still pending before the district court.

B. The Ninth Circuit's Decision Is Not In Conflict With Wolff v. McDonnell

Petitioners' contention that the Ninth Circuit's decision is not consistent with Wolff v. McDonnell, 418 U.S. 539 (1974), was carefully considered by the Ninth Circuit on rehearing. The court rejected this contention, and even dissenting Judge Kilkenny did not point out any respect in which the decision is not in accord with Wolff (Appendix to Petition, pp. vi-vii) 4/ Further, this Court itself recognized that Wolff was not the definitive and final word on due process in prison, stating that Wolff's conclusions were "not graven in stone". 418 U.S. at 572. That the Court did not mean to stifle development in this field, or necessarily to disagree with the conclusions reached by the Ninth Circuit, can be seen from its discussion of the law in the various circuits. 418 U.S. at 572, n. 20. While extensively discussing the Ninth Circuit's decision,

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3/ Furthermore, the Ninth Circuit has held that its decision in Clutchette is prospective only, Wheeler v. Procunier, 508 F.2d 888 (9th Cir. 1974), so the only real issue is what San Quentin's disciplinary procedures will be in the future; this is the issue pending before the district court.

4/ Judge Kilkenny would merely have remanded to the district court for a determination of whether the current plan complies with Wolff. This is essentially what the district court presently has before it.

the Court did not overrule or even disapprove it. Surely, if the Court's position were fixed and it deemed the Ninth Circuit's decision to be inconsistent with its own in Wolff, it would have taken the obvious opportunity to say so.

Moreover, the instant case can easily be reconciled with Wolff because it is distinguishable on the facts. In Wolff this Court carefully examined the Nebraska statutory and administrative provisions governing disciplinary proceedings, as well as the testimony in the record as to how they worked in practice. The Court referred to the warden's testimony that a "great number" of disciplinary cases were "resolved without contest" and many inmates admitted guilt to an investigator. 418 U.S. at 552, n. 10. The Court naturally concluded that it would be inappropriate to require much due process in such cases. In the present case, however, respondents have expressly disclaimed any interest in requiring due process hearings except in cases in which there are real factual disputes and the consequences are serious. Moreover, the disciplinary consequences to prisoners are more serious in California than in Nebraska, and California prisoners suffer greater "grievous losses". Thus, until the district court's decision in this case, California prisoners could be subjected not only to isolation (the apparent equivalent of solitary confinement in Nebraska), but also indefinite confinement to segregation, referral to the parole board for reconsideration or denial of parole, assessment of damages or forfeiture of the prisoner's earnings and referral to the district attorney for prosecution. See Clutchette v. Procunier, 328 F.Supp.at 775-77. These serious consequences did not befall Nebraska prisoners and were not presented in Wolff.

Petitioners argue that the Ninth Circuit's decision goes beyond Wolff in four respects: (1) An "absolute right to

counsel", (2) the ability to call witnesses, (3) confrontation and cross-examination and (4) a decision based on the evidence presented. But careful analysis of the Ninth Circuit's decision discloses no inconsistency with Wolff.

1. Right To Counsel In Criminal Proceedings

Before the district court's decision in this case, the practice at San Quentin in cases of alleged felonies was to bring the accused prisoner before the Disciplinary Committee, inform him that his case might be referred to the District Attorney and give him the standard Miranda warnings, including his right to remain silent, his right to counsel and the fact that anything he says at the disciplinary hearing "will be used against him at his subsequent trial." Clutchette v. Procunier, 328 F.Supp. at 778. If the prisoner asked for assistance of counsel (even if he had retained counsel), he was told that this right attached only when he was questioned by the District Attorney. If he chose to remain silent, the Disciplinary Committee proceeded nonetheless to adjudicate his case, with the prisoner disabled from making any defense. The district court concluded that "the trap is unavoidable" -- the prisoner was required either to (1) remain silent and sacrifice any defense to the disciplinary charge, or (2) speak in his own defense and risk self-incrimination in a later criminal prosecution.

This procedure was condemned by the courts below as failing to protect the accused's privilege against self-incrimination. As a result of the district court's decision, petitioners have altered their procedure by postponing disciplinary actions until the completion of criminal proceedings.

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This was an option suggested by the Ninth Circuit. 497 F.2d at 823. 5/ While petitioners now complain that this solution "is not entirely satisfactory" (Petition, p. 8), this matter is presently pending before the district court, on an up-to-date evidentiary record, and is not ripe for review by this Court.

Petitioners' strained attempt to argue that this issue was decided by Wolff, even though never adverted to by this Court, must fail. The Ninth Circuit rejected this argument, as did the First Circuit. See Palmigiano v. Baxter, 410 F.2d. 534 (1st Cir. 1974). The issue is too distinct from conventional due process analysis to have been decided sub silentio, and too many decisions of this Court, relied on by the Ninth Circuit, would have to be qualified to reach the result sought by petitioners. The Court certainly cannot be deemed to have decided this knotty question of custodial interrogation without any discussion of it at all. The plain truth of the matter is that the issue was never addressed in Wolff, and the decision below is therefore not in any way inconsistent with Wolff.

In conclusion we point out that other courts have taken varying approaches to similar problems. In Palmigiano v. Baxter, supra, and Roberts v. Taylor, ___F.Supp.___, No. 5075 (D.R.I. Feb. 25, 1975), the courts ordered that "use immunity" be provided to prisoners faced with disciplinary proceedings involving criminal conduct, so that they could defend themselves

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5/ Since petitioners contend that such postponement of disciplinary proceedings is permissible, their assertion that the Ninth Circuit ordered an "absolute" right to counsel is misleading. Further, even if petitioners elected not to postpone the proceedings, the courts below required counsel only in those disciplinary cases in which the accused can be criminally prosecuted. It is true, as petitioners state, that one of the common disciplinary offenses in prison is possession of a weapon, which is also a felony under the California Penal Code (Petition, pp. 9-10). (Petitioners' assertion that there are few criminal prosecutions for possession of a weapon is not supported by anything in the record of this case.) Petitioners fail to point out that murder is also alarmingly common in California prisons, and they do not assert that prosecutions for murder are rare. Evidence regarding disciplinary proceedings in murder cases has now been presented to the district court but is not in the record before this Court.

without fear of self-incrimination. Cf. Fowler v. Vincent, 366 F.Supp. 1224 (S.D.N.Y. 1973). The California Supreme Court recently held that use immunity must be afforded in the analogous situation of probation revocation, when the hearing is held before the criminal trial for the same conduct. People v. Coleman, ___C.3d.___, Crim. No. 17822 (April 3, 1975). 6/ Cf. Melson v. Sard, 402 F.2d. 653, 655 (D.C. Cir. 1968) (parole revocation). Another court decided that principles of double jeopardy might come into play, and ruled that acquittal of the criminal charges barred administrative prison punishment. Barrows v. Hogan, 379 F.Supp. 314 (M.D. Pa. 1974); compare Clutchette v. Procunier, 328 F.Supp. at 778. In other words, the lower courts are beginning to suggest different approaches to the problem. In these circumstances, Justice Frankfurter's observation is pertinent:

> "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." State of Maryland vs. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

This is doubly true in the present case, where this entire issue is still pending before the district court.

2. Ability To Call Witnesses

Wolff stated that while prisoners have a right to call witnesses on their behalf, this right is not "unrestricted", "at least on the record made in this case." 418 U.S. at 566 We have never contended that there is an absolute or unrestricted right to call witnesses. We have presented evidence to the district court to show that petitioners in practice never

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6/ The Coleman decision contains a scholarly discussion of the threats to the Fifth Amendment privilege posed not only by probation hearings but also by prison disciplinary proceedings. The Court concluded that prison disciplinary cases presented the extreme situation of providing only minimal procedural rights while at the same time having the potential of imposing serious personal deprivations (Slip op. p.27).

allow prisoners to call any witnesses. On the other hand, petitioners have proposed to the district court that their Plan, which authorizes the officials to prohibit calling of witnesses in many circumstances, is authorized by Wolff. As noted above, the district court has not yet ruled on this question, and there is no reason for this Court to rule on it on the present record.

3. Confrontation and Cross-Examination

Wolff concluded that prisoners do not generally "at the present time" have the right to confront and cross-examine witnesses. 418 U.S. at 568. 7/ The Court emphasized, however, that prison practices in this area are now "diverse" and in the "experimental" stage. Id. at 569. The Court concluded that whether to grant confrontation and cross-examination in individual cases would be committed to the "sound discretion of the officials of state prisons." Id.

Nothing in the Ninth Circuit's decision is inconsistent with the Court's holding in Wolff. The Ninth Circuit merely specified a "method by which the soundness of the discretion [accorded by Wolff] could be subjected to scrutiny", by requiring that the officials state the reason for denying these rights in individual cases. Accord, Daigle v. Hall, 387 F.Supp. 652 (D. Mass. 1975). This will significantly aid in the "experimental" development of due process procedures recognized by this Court. Rather than have the courts speculate about whether confrontation helps or hurts in maintaining prison discipline, there will be a record in each case. The Ninth Circuit specified that the problems of protecting informers should in the first

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7/ Since Nebraska prisoners, involved in Wolff, were in fact allowed to question the charging party in their proceedings, 418 U.S. at 567, n. 1 the Court's conclusion might be considered largely dictum.

instance be worked out by the prison officials and, in fact, this matter is before the district court in the Plan presented by petitioners. Again, there is no conflict with Wolff requiring review by this Court.

4. Decision Based On The Evidence Presented

Petitioners concede that implicit in Wolff "is the principle that the accused inmate must be afforded an opportunity to reply to any evidence against him upon which the Disciplinary Committee may rely in reaching its decision" (Petition, p. 19). The reason of course is that due process does not permit findings of fact to be made on evidence kept secret from the accused, which he has no opportunity to meet. There may be extraordinary circumstances in which, as Wolff recognized, the statement of the evidence relied upon "may properly exclude certain items of evidence", 418 U.S. at 565, but this must be the exception and not the rule. Disciplinary hearings would be a sham if the decisionmakers were authorized routinely to make ex parte determinations without giving the accused an opportunity to know and possibly rebut the evidence used against him. We do not understand petitioners to contend otherwise, and we see no conflict with Wolff.

CONCLUSION

For the reasons stated, the writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1194

JERRY J. ENOMOTO, et al.,
Petitioners,

vs.

JOHN WESLEY CLUTCHETTE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINION AND DECISIONS BELOW

The writ of certiorari issued on June 9, 1975, to review the opinion of the United States Court of Appeals for the Ninth Circuit in *Clutchette v. Procunier,* 510 F.2d 613 (9th Cir. 1974). This "Opinion on Rehearing" purported to delineate the impact of *Wolff v. McDonnell,* 418 U.S. 539 (1974) upon the earlier opinion which is reported at 497 F.2d 809 (9th Cir. 1974). As the Opinion on Rehearing republishes substantial portions of the earlier opinion [See 510 F.2d 616] both are before this court on review.

JURISDICTION TO REVIEW

On April 25, 1974, the Ninth Circuit Court of Appeals rendered its first opinion in the appeal of the administrators of the California state prison system from the Memorandum and Order in *Clutchette v. Procunier,* 328 F.Supp. 767 (ND Cal. 1971). The prison administrators moved for a rehearing which they suggested be held en banc and requested modification of the opinion. The panel granted a rehearing limited to the impact of this court's decision in *Wolff v. McDonnell,* 418 U.S. 539 (1974).

Thereafter, on October 21, 1974, that panel issued its Opinioin on Rehearing which modified and reaffirmed its earlier opinion. See *Clutchette v. Procunier,* 510 F.2d at 616. Timely suggestion for a rehearing en banc was made but because that suggestion did not stay issuance of the mandate [Rule 35(c), Federal Rules of Appellate Procedure] petitioners requested, and were granted an extension of time to and including March 20, 1975 within which to petition this court for a writ of certiorari. When the suggestion for a rehearing en banc was denied, we petitioned this court for a writ of certiorari on March 20, 1975. That petition was granted on June 9, 1975.

The jurisdiction of this court rests on Title 28, United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Does the Constitution require counsel in the context of state prison disciplinary proceedings where the alleged misconduct may also violate the state's criminal laws?

2. By its decision, has the Court of Appeals unduly circumscribed the discretion, recognized by this Court as necessarily conferred upon state prison administrators, to experiment with evolving procedures for maintaining prison discipline?

3. Where this Court, the final arbitrator of the Constitution, has enunciated the procedures which comport with the demands of due process as applied to the several states, may lower federal courts properly impose further requirements on the States?

STATUTES INVOLVED

United States Constitution, Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, U.S. Code Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 42, United States Code Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

California Penal Code Section 2079

"Subject to the orders and the policies established by the department, it shall be the duty of the wardens to supervise the government, discipline and policy of the prisons, and to enforce all orders and regulations."

California Penal Code Section 2080

"A copy of the rules and regulations prescribing the duties and obligations of prisoners shall be furnished to each prisoner in a state prison or other facility under the jurisdiction of the Department of Corrections."

California Penal Code Section 5003

"The [Department of Corrections] has jurisdiction over the following prisons and institutions: (a) The California State Prison at San Quentin."

California Penal Code Section 5054

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the [Director of Corrections]."

STATEMENT OF THE CASE

Plaintiffs, several inmates of the California State Prison at San Quentin, filed a complaint for injunctive relief and damages in the United States District Court for the Northern District of California on November 20, 1970 pursuant to Title 42, United States Code Section 1983. They alleged that the administrators of the California prison system had, by the manner in which they conducted prison disciplinary hearings, deprived them of rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Specifically, plaintiffs alleged that the procedures employed in prison disciplinary proceedings failed to contain due process safeguards sufficient to comport with the requirements of the Fourteenth Amendment to the United States Constitution. The complaint prayed for a declaratory judgment, preliminary and permanent injunctive relief and, for plaintiff Clutchette, damages.

An order to show cause why a preliminary injunction should not be entered issued the day the complaint was filed (See Single Appendix page 2, Docket Entries 1 and 3) and the hearing on that order to show cause was held two weeks later. On June 21, 1971, the District Court entered its Memorandum and Order declaring that the disciplinary procedures employed by the administrators of the California State Prison at San Quentin violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. See, *Clutchette v. Procunier*, 328 F.Supp. 767 (ND Cal. 1971).

The district court went on to enjoin permanently the state prison administrators from conducting further disciplinary hearings under existing procedures. The injunction portion of the district court's order was stayed pending appeal. However, the state prison administrators were ordered to submit a plan for the conduct of prison disciplinary hearings which comported with the standards outlined in the district court's opinion.[1] *Clutchette v. Procunier,* 328 F.Supp. at 784, 785.

An appeal was pursued and on April 25, 1974, a panel of the Court of Appeals, Judge Kilkenny concurring and dissenting, affirmed the decree and orders of the district court as modified only to the extent necessary to comply with the Court of Appeals' opinion. *Clutchette v. Procunier,* 497 F.2d 809, 824 (9th Cir. 1974).

The state prison administrators petitioned for a rehearing which was granted by the panel limited solely to the effect *Wolff v. McDonnell,* 418 U.S. 539 (1974), which had been decided in the interim, had upon this case. On October 21, 1974, the panel issued their final opinion purporting to conform to the views expressed by this court in *Wolff v. McDonnell, supra,* However, they merely modified their earlier opinion only with respect to loss of privileges, confrontation and cross examination of witnesses, and the right to

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[1]The plan submitted to the court by the Director of the California Department of Corrections was objected to by plaintiffs as not in compliance with the district court's order. That plan has been voluntarily put into effect by the prison administrators. See *Clutchette v. Procunier,* 510 F.2d at 616.

counsel or counsel-substitute in disciplinary proceedings other than those involving infractions also punishable by state authorities as crimes. They reaffirmed their prior opinion in all other respects finding the remaining portions either in harmony with *Wolff*, or related to issues untouched by *Wolff*. Judge Kilkenny dissented. *Clutchette v. Procunier*, 510 F.2d 613 (9th Cir. 1974).

John Wesley Clutchette, as an inmate confined in the Adjustment Center of the California State Prison at San Quentin, was required to visit in a particular area of the general prison visiting room. On Novem- 14, 1970, inmate Clutchette was visiting a friend in the prison's visiting room when, without obtaining permission, he moved to a forbidden area of that room. When the officer in charge of the visiting room informed inmate Clutchette that he would have to return to his cell he broke a chair and used the leg to assault an officer. The disciplinary proceeding which formed the basis of this class action followed. As a result of the disciplinary committee's findings, inmate Clutchette suffered several changes in his status: he lost his dessert (Sig. App.[2] page 64); a one hour per day exercise period for 29 days (Sig. App. page 53); his personal possessions, other than legal papers, religious books, and toilet articles were removed from his cell for 29 days (Sig. App. pages 67-69); and the privilege of purchasing items from the inmate canteen was suspended for a period of 60 days (Sig. App. page 59).

[2]"Sig. App." refers to the Single Appendix.

Prior to the imposition of these sanctions inmate Clutchette received written notice of the charges against him (Sig. App. pages 33-35; 104-105). As the hearing commenced inmate Clutchette was advised per *Miranda* of his constitutional right to remain silent and he requested an attorney (Sig. App. pages 46-48). At that time the committee informed him that counsel would be provided if the District Attorney interrogated him or the matter proceeded to the courts (Sig. App. page 49). Although inmate Clutchette signed a waiver of his rights (Sig. App. page 49) he remained silent throughout the disciplinary proceedings. The major charging allegations of the supplemental reports supporting the complaints against inmate Clutchette were read to him (Sig. App. pages 37-38). While he was ultimately found to have committed the charged infractions, the disciplinary committee's major concern was to fashion appropriate sanctions to be imposed for the conduct inmate Clutchette had exhibited so as to prevent a reoccurrence (Sig. App. pages 123-124).

The District Court found from the evidence and exhibits presented at the hearing held December 4, 1970, that inmates accused of serious disciplinary infractions are served with a "notice of complaint"[3] within 24 hours of charges being preferred against them. The District Court however found that prior

[3]This "notice of complaint" is intended to inform the inmate what the charge against him is (Sig. App. 34, 105) and the officer who serves the notice reads the actual report of the alleged disciplinary violation to the inmate (Sig. App. 104-105).

to appearing before the disciplinary committee the inmate was often told only the number of the departmental rule which he had been charged with violating, rather than receiving a description of his particular actions. A hearing officer was required to see an accused inmate within 24 hours of charges being filed against him and could adjudicate offenses of a minor nature. However, all serious offenses were referred to the disciplinary committee. *Clutchette v. Procunier,* 328 F.Supp. at 773-775.

In the District Court's opinion the most troublesome area concerned disciplinary procedures where the inmate was charged with an infraction which could also be prosecuted as a crime. In this situation the disciplinary committee read the inmate his *Miranda* warnings (Sig. App. pages 46-47) but, since the disciplinary committee's function was not to secure incriminating statements for use at subsequent criminal trials, the inmate was advised an attorney would not be made available. The inmate could either exercise or waive his right to remain silent. The disciplinary committee was required to proceed to adjudicate the alleged infraction on the basis of the evidence at its disposal if the inmate remained silent (Sig. App. page 113) and inmates were allowed to present statements of other inmates, correctional officers, or civilian witnesses, in writing, if they wished.

In its initial opinion the Court of Appeals extended the following due process safeguards to all disciplinary hearings conducted in the California State Prison at San Quentin:

1) Prompt notice which informs the inmate of the charges against him and the details of his alleged offense delivered sufficiently in advance of the hearing to enable him to prepare his defense;

2) The right to be heard and to present witnesses limited solely to prevent repetitiousness;

3) The unlimited right to confrontation and cross examination of witnesses including inmates;

4) A "neutral and detached" hearing body; and

5) A decision based on the evidence presented at the hearing.

In addition, when the consequences of disciplinary action are most serious or the conduct could be prosecuted criminally, counsel was required. See *Clutchette v. Procunier,* 497 F.2d 809, 822-823 (9th Cir. 1974).

On rehearing, this opinion was modified so that the procedural safeguards announced did not apply to the temporary suspension of "privileges". The right to confrontation and cross examination was modified so that the prison authorities could limit it but only if they could establish concern for reprisals, unmanageability, disruption, or the safety of prison personnel. Under compulsion of *Wolff, supra,* the previously granted right to counsel or counsel-substitute was modified so as to depend not on the seriousness of the disciplinary sanction threatened, but rather on the ability of the prisoner to present his own case. Holding that this court in *Wolff, supra,* did not reach

the question of the right to counsel when a prisoner is required to appear before a disciplinary committee charged with violating a prison rule which may also be punishable as a crime, the requirement that counsel be provided in that situation was reaffirmed. *Clutchette v. Procunier,* 510 F.2d 613, 616 (9th Cir. 1974).

Our suggestion that this case was of such importance that a rehearing en banc should be granted was denied. We petitioned for certiorari to review the decision of the Court of Appeals which this Court granted on June 9, 1975.

SUMMARY OF ARGUMENT

1. Inmate Clutchette was charged by prison officials with misconduct which could have been criminally prosecuted by other state officials. At his prison disciplinary hearing he was given the opportunity to explain his conduct after receiving *Miranda v. Arizona,* 384 U.S. 436 (1966) type warnings. There is no record of his making any statement at that hearing and no criminal proceedings were ever instituted against him as a result of these prison rule infractions. The courts below reasoned from *Miranda* that all inmates charged with prison rule violations which may also be punished as crimes are entitled to counsel at their prison disciplinary hearings. We contend that counsel is never required in California prison disciplinary proceedings because the Fifth Amendment privilege against self-incrimination, as applied to the

states through the due process clause of the Fourteenth Amendment, is not infringed by the manner in which California prisons conduct their disciplinary hearings.

Miranda did not create a substantive constitutional right to its admonitions. Rather, it declared a judicial rule of procedure governing the admission and exclusion of evidence at trial. *Michigan v. Tucker,* 417 U.S. 439, 444 (1974). Hence, the resolution of the issue whether counsel is required in prison disciplinary proceedings where the alleged misconduct may also be punished criminally should await a case arising from a trial at which an inmate's statement, uttered at his disciplinary hearing, is used against him.

Miranda required counsel to protect the Fifth Amendment right against compulsory self-incrimination. The manner in which prison disciplinary hearings are conducted in California does not infringe the inmate's Fifth Amendment right against compulsory self-incrimination. Although the inmate is faced with a difficult choice, he is not compelled to speak nor is the exercise of his right to silence penalized. The Constitution does not require that he be relieved of this choice. *McGautha v. California,* 402 U.S. 183, 213 (1971).

This Court held in *Wolff v. McDonnell,* 418 U.S. 539, 570 (1974) that counsel was not required in prison disciplinary hearings. There are no circumstances in this case which would warrant the insertion of counsel into those hearings and their alteration into adversary proceedings.

2. In several particulars the initial opinion of the Court of Appeals *Clutchette v. Procunier,* 497 F.2d 809 (9th Cir. 1974) was not modified on rehearing. *Clutchette v. Procunier,* 510 F.2d 613 (9th Cir. 1974). Three areas of the initial opinion, republished by the failure to modify on rehearing, are of particular concern to the administrators of California's prison system: the inmate's ability to call witnesses, the rights to confrontation and cross-examination, and the requirement of a decision based only on evidence presented at the disciplinary hearing. We contend that in each of these areas the Court of Appeals has imposed requirements beyond constitutional minimums and has thereby unduly circumscribed the discretion of California's prison administrators to experiment with new and evolving procedures for maintaining prison discipline.

3. As this Court, not the lower federal courts, is the final arbitrator of the Constitution, once you have delineated the minimum procedures required in prison disciplinary hearings, it is for the states, not the lower federal courts, to go further. *Wolff v. McDonnell,* 418 U.S. at 569; *McGautha v. California,* 402 U.S. 183, 220-221 (1971). Unlike federal courts, state courts are not constrained by the notions of federalism to limit their demands for procedural fairness to the rudimentary. They can, in the exercise of their supervisory powers, fashion extensive and detailed procedures well beyond anything required by the Constitution. When faced with a question of procedural due process in state prison disciplinary hearings, the

lower federal courts must limit their pronouncements to the holdings of this Court.

4. The inmates in this case are not entitled to any retrospective relief. *Wolff v. McDonnell,* 418 U.S. at 555; *Cox v. Cook,* ..... U.S. ....., 43 U.S. Law Week 3513 (74-751 Decided March 24, 1975). The current rules and regulations of the California Department of Corrections concerning inmate discipline go far beyond the minimums compelled by the due process clause of the Constitution. This Court should therefore reverse the opinion of the Court of Appeals and remand the case to the district court with directions to dismiss.

ARGUMENT

I

THERE IS NO RIGHT TO COUNSEL—EITHER RETAINED OR APPOINTED—IN THE CONTEXT OF PRISON DISCIPLINARY PROCEEDINGS

The facts concerning plaintiff John Wesley Clutchette's disciplinary proceeding are for the most part typical of prison discipline cases. On the afternoon of November 14, 1970, Clutchette, an inmate already housed in the San Quentin Adjustment Center, was in the visiting room of the prison when a disturbance erupted. During that disturbance, he assaulted a prison guard with the leg of a broken chair. Thereafter, a disciplinary hearing was held. In accordance with the prison's then applicable procedures [*Clutchette v. Procunier,* 497 F.2d at 815] inmate Clutchette was orally informed by an officer of the charges

against him within 24 hours of the alleged infraction. When he appeared before the disciplinary committee the complaint and a summary of the supplemental reports were read to him and he was afforded the opportunity to explain his conduct after being given the standard *Miranda*[4] warnings. However, upon his requesting the assistance of counsel he was informed that counsel would be provided only in the event that he was subjected to interrogation by a representative of the district attorney's office. Inmate Clutchette apparently exercised his right to remain silent as there is no record of his making any statement at this hearing. Based upon the evidence adduced at that hearing, he was found to have committed the charged infractions of (1) refusing to obey a direct order by an officer, (2) misconduct in the presence of a visitor, (3) conduct that could lead to violence, and (4) assaulting an officer. Although the assault charge was certainly punishable as an independent crime, as is true in almost all such cases, no criminal charge was ever filed against inmate Clutchette on account of this misconduct. As no criminal complaint was filed, a fortiori, there was no use in a criminal proceeding of any statement made by inmate Clutchette.

Both the district court and the Court of Appeals reasoned that under *Miranda v. Arizona, supra,* an inmate charged with a prison rule violation, which may also be punished criminally, must be afforded counsel at the disciplinary hearing. Although the Ninth Circuit recognized that inmates are not inter-

[4] *Miranda v. Arizona,* 384 U.S. 436 (1966).

rogated at such hearings, it nevertheless concluded that because the hearing process "is designed to induce revelation of all facts, including the inmate's version of them" such hearings are inherently inquisitive. *Clutchette v. Procunier,* 497 F.2d 809, 823 (9th Cir. 1974). Accordingly, in order to safeguard the inmate's Fifth Amendment privilege against self-incrimination, that court affirmed the district court's requirement that counsel be provided when a prisoner is charged by prison authorities with a rule violation which may be punishable as a crime by other state authorities.[5] *Clutchette v. Procunier,* 328 F.Supp. 767, 778 (N.D. Cal. 1971), *aff'd* 497 F.2d 809, 823, *aff'd* on rehearing, 510 F.2d 613, 616.

We contend the district court and the Court of Appeals erred in reaching the issue whether counsel

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[5]Alternatively, the Ninth Circuit opined that sufficient protection of the inmate's privilege would be provided if the prison administrators postponed any disciplinary action until after court proceedings or, if the inmate were to be required to speak in his own defense at his disciplinary hearing, he be granted "use-immunity" for his disclosures in any subsequent criminal trial. *Clutchette v. Procunier,* 497 Fed.2d at 823, 834 n.23. Consideration of these options necessarily depends on the validity of the holding that counsel is required at the disciplinary hearings. While delay is the course currently being followed in California prison disciplinary hearings (See, California Department of Corrections, Rules and Regulations, Ch. 4, Art. 5, DP 4507-08, reproduced in the Appendix to the Petition pages xvii-xxi) it seriously delays the imposition of discipline and has led to charges of subterfuge. "Use-immunity" is impractical and unwieldly. The prison administrators have absolutely no authority to grant an inmate any kind of immunity for anything the inmate says at his disciplinary hearing. Since there is no transcription made of disciplinary hearings it is literally impossible to know what questions may be asked and what answers given in order to determine how far any such immunity would extend. The creation of this form of immunity would inevitably "cheapen the Fifth Amendment." *Palmigiano v. Baxter,* 510 Fed.2d 536 (1st Cir. 1974), cert. granted.

is required in prison disciplinary hearings to protect inmates' Fifth Amendment rights. Inmate Clutchette made no statement. He availed himself of his Fifth Amendment rights. There is therefore no case nor controversy between the parties in this case. The resolution of this issue whether there must be counsel at disciplinary hearings to protect Fifth Amendment rights at trial should await the case where an inmate's statement, taken during a prison disciplinary hearing, is admitted in evidence at a subsequent criminal trial. It is our position that counsel is never required in California prison disciplinary proceedings for Fifth Amendment reasons because the Fifth Amendment privilege against self-incrimination is not infringed by the manner in which those hearings are conducted.

At the outset, we emphasize that the issue here does not concern the admission into evidence at trial of any statement, incriminating or otherwise, made by a prison inmate while at a disciplinary hearing. This case does not arise from a criminal conviction in which an arguably involuntary statement was admitted into evidence over the objection of the defendant.[6] We are here concerned with whether, as a constitutionally compelled procedure, state prison administrators must afford inmates the assistance of counsel at prison disciplinary hearings whenever the mere possibility of subsequent criminal prosecution exists. The courts

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[6]We submit, as with any question of the possible use at trial of arguably compelled disclosures, these issues are properly resolved when they arise from a trial setting rather than, as here, trying to decide them on the basis of hypothesis. *United States v. Ben Blue*, 384 U.S. 251, 255 (1966).

below reasoned that *Miranda* created substantive rights to its respective admonitions thereby requiring that an inmate, whose misconduct may also be criminally punishable, must be afforded an attorney upon request at his prison disciplinary hearing. We contend the *Miranda* warnings are simply judicially declared rules of procedure governing the admission and exclusion of evidence at trial. We submit that the opinions of the courts below mandating the implementation of these warnings as a basic constitutional imperative are based upon a fundamental misreading of *Miranda*.

The central concern of *Miranda* was and is the protection of an accused's Fifth Amendment right to remain silent. The suspects in the *Miranda* group of cases had been arrested, held in custody at a police station, and subjected to protracted police interrogation using inherently coercive techniques. This Court held that absent appropriate safeguards to protect the accused's right to remain silent, any resulting confession must be deemed the product of that coercion and therefore to have been compelled within the meaning of the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. *supra* at 457-58.[7] Although the *Miranda*

[7]In support of this conclusion, the Court elaborately recounted examples of past brutality, torture, and psychologically coercive interrogation techniques, utilized by the police to intimidate a suspect and subject him to the will of his examiner. *Id.* at 445-57. These methods of custodial interrogation, purposefully designed to overcome any reluctance to confess, necessitated the prophylactic warnings of the suspect's privilege against compulsory self-incrimination. Further, in order to insure the trustworthiness of any resulting confession, and that the accused's rights were in fact being honored, this Court required, as a part of those admonitions, that the suspect be afforded the presence of counsel. *Id.* at 470-71.

warnings have by now become a litany whose rote recitation is seemingly imbedded in the Constitution, these suggested safeguards were never envisioned as being of constitutional dimension. They were considered necessary to preserve the right to remain silent in the face of incommunicado police interrogation. Their application was not intended to create a constitutional straitjacket around state officials.

> "It is impossible for us to foresee the potential alternatives for protecting the privilege which may be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." 384 U.S. *supra* at 467.

Thus, "these procedurai safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker,* 417 U.S. 439, 444 (1974).

Where the *Miranda* warnings are required but not given the inquiry whether the Fifth Amendment protection against compulsory self-incrimination has been infringed upon turns on "a comparison of the facts [of the case] . . . with the historical circumstances underlying the privilege against self-incrimi-

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But, there are no similar "psychologically coercive interrogation techniques" designed to elicit incriminating statements employed at California prison disciplinary hearings. To the contrary inmates are informed that their silence will not result in adverse inference or consequence.

nation. *Michigan v. Tucker*, 417 U.S. at 444-445. By analogy whether *Miranda* warnings and the presence of counsel are required in prison disciplinary proceedings ultimately turns on whether the procedures utilized at those proceedings directly infringe the Fifth Amendment as applied to the States through the due process clause of the Fourteenth Amendment.[8] A comparison of the procedures utilized in California prison disciplinary proceedings with the historical circumstances underlying the privilege against compulsory self-incrimination compels the holding that the inmate's Fifth Amendment rights are not directly infringed. Hence, due process requires neither the *Miranda* warnings nor counsel.

The history of the evil uses of the ecclesiastical inquisition and Star Chamber proceedings, which led to the adoption of the Fifth Amendment privilege against self-incrimination, have been recounted in the opinions of this Court. *See, e.g., Michigan v. Tucker, supra; Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Ullman v. United States*, 350 U.S. 442 (1956). "[T]hose investigations, which placed a premium on compelling subjects to admit guilt from their own lips. . . ." [*Michigan v. Tucker, supra*, at 440] fos-

[8]Since disciplinary hearings are not part of the criminal process [*Wolff v. McDonnell*, 418 U.S. at 556], there is no Sixth Amendment right to counsel. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). If there is any right to counsel at prison disciplinary proceedings, it must spring from the due process clause, and

> "[d]ue process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel." *Amrine v. Tines*, 131 F.2d 827, 833 (10 Cir. 1942).

tered the desire on the part of the framers of the Constitution to protect citizens against any such compelled disclosures. In *Miranda,* this concern was extended to police interrogations, because of their inherently coercive atmosphere and severe pressures to confess guilt. Prison disciplinary proceedings, however, present a fundamentally different situation. They are informal hearings, conducted to insure that discipline is not imposed arbitrarily, *see Wolff v. McDonnell,* 418 U.S. 539 (1974), and in such a way that the inmate perceives the hearing process as being essentially fair. The California prisoner is informed of the charges against him and given an opportunity to respond. But he is not questioned. Certainly none of the interrogation techniques which led this Court to develop the *Miranda* safeguards are present in these hearings. There are no psychological ploys used to overcome a resistance to confess. Indeed, it has never been charged, even by these plaintiffs, that inmates are in any way threatened with reprisals or adverse inference if they refused to talk. In short, the hearings under consideration in this case simply do not represent the kind of evils which gave rise to the need for *Miranda* warnings to protect the Fifth Amendment privilege.

Although prison disciplinary hearings are not, from an historical perspective, proceedings which would have necessitated the protection of the Fifth Amendment, its protection is applicable to those proceedings whenever there is an exposure to criminal responsibility. We insist, however, that prison disciplinary proceedings as conducted in California do not in any

way infringe the rights protected by the Fifth Amendment. The privilege against compulsory self-incrimination applies beyond its literal reference to criminal cases "to criminal and civil proceedings alike whenever the answer might tend to subject to criminal responsibility him who gives it." *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). Thus, the privilege has been held to apply in situations where an individual may be criminally punished for what he has been compelled to say, *Malloy v. Hogan,* 378 U.S. 1 (1964), or in the alternative where the exercise of the right to remain silent is itself penalized. *Griffin v. California,* 380 U.S. 609 (1965). But, unlike cases such as *Lefkowitz,*[9] which penalized the refusal to speak, the mere silence of a prison inmate does not result directly in the imposition of any penalty. *Cf. United States v. Solomon,* 509 F.2d 863, 872 (2d Cir. 1975). An inmate is not punished on account of his silence and he remains completely free at all times to exercise that privilege. He is informed that he has a right to remain silent and that if he chooses to speak his words may be used against him.[10] Thus, he need not speak upon fear of punishment solely because of his silence. Before he can be disciplined there must be an affirmative showing, by a preponderance of the evidence, that he has committed the charged infraction. This showing is made

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[9]See also *Gardner v. Broderick,* 392 U.S. 273 (1968), *Sanitation Men v. Sanitation Comm'r,* 392 U.S. 280 (1968), *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Spevak v. Klein,* 385 U.S. 511 (1967); *Murphy v. Waterfront Comm'n,* 378 U.S. 52 (1964); *Griffin v. California,* 380 U.S. 609 (1965).

[10]His words may of course exculpate him or mitigate the infraction.

before the inmate need decide whether to remain silent or speak in his own defense. *Cf. Brooks v. Tennessee,* 406 U.S. 605 (1972). And, there is no legal sanction forcing the inmate to forego his right of silence. The inmate at a prison disciplinary hearing is simply not exposed to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n,* 378 U.S. at 55.

Although the inmate is not compelled to speak upon pain of being punished for choosing to remain silent, we recognize that he is faced with a difficult choice. He is, in the vernacular, caught between a rock and a hard place. Should he decide to remain silent, he loses one opportunity to explain his behavior. On the other hand, if he admits his misconduct by way of justification or mitigation, he risks possible incrimination. To be sure, the choice is not a pleasant one. But the events necessitating that the inmate choose do not render the decision coerced nor unlawfully infringe upon the right to remain silent. There are numerous instances in which the desire to speak in one's own defense must be weighed against the consequences of making this election. This is the essential hard choice facing every defendant at a criminal trial.

> "[T]he legal system is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California,* 402 U.S. 183, 213 (1971); *see United States v.*

Kordel, 397 U.S. 1 (1970); *De Vita v. Sills,* 422 F.2d 1172 (3d Cir. 1970).

In *Crampton v. Ohio,* the companion case to *McGautha,* the defendant, charged with murder and facing the death penalty, attacked the Ohio unitary trial system, arguing that under this system he could not address the jury on the issue of mitigating punishment without at the same time foregoing his right to remain silent on the issue of guilt. *Id.* at 220-221. This Court did not dispute that the free exercise of his Fifth Amendment right of silence was burdened, but it did not agree that this burden was impermissible. Since there were legitimate reasons for the unitary trial procedure, this Court held that Crampton's desire to speak to his sentencer on mitigation did not unconstitutionally compel his incrimination as to guilt and as a result did not infringe his right to remain silent. *Id.* at 216. Similarly, in the case of an inmate at a prison disciplinary hearing, the pressures which lead him to speak arise from "the force of historical fact beyond both his and the State's control and the strength of the State's case built on those facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments." *Id.* at 216; *Williams v. Florida,* 399 U.S. 78, 85 (1970).[11] Since the challenged procedure serves purposes other than "needlessly" penalizing protected rights, the Constitution does not, as a matter of due process, for-

[11]See *Shimabuku v. Britton,* 503 F.2d 38 (10th Cir. 1974); *Flint v. Mullen,* 499 F.2d 100 (1st Cir. 1974).

bid compelling the choice even though it has the effect of discouraging the exercise of the protected rights. *Chaffin v. Stynchcombe,* 412 U.S. 17, 30-32 (1973); *Brady v. United States,* 397 U.S. 742, 746 (1970); *see United States v. Jackson,* 390 U.S. 570, 582 (1970); *Brown v. United States,* 356 U.S. 148 (1958). The purpose of the challenged procedure, the need to impose discipline swiftly, both as a deterrent and as part of the rehabilitative process, has been already recognized.

> "Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution.

> This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account. . . ." *Wolff v. McDonnell,* 418 U.S. at 562-563.

"The constitutionally compelled minimum requirements of procedural due process appropriate in prison disciplinary proceedings [*Wolff v. McDonnell,* 418 U.S. at 558] provide the inmate with an opportunity to present his defense without the necessity of counsel. This Court has emphasized that "prison disciplinary hearings are not a part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974); *cf. Morrissey v. Brewer,* 408 U.S. 471, 488 (1972). Nor, is it controlling that the charged prison rule violation may also violate state law. In *Wolff,* the prison inmates had been charged, among other things, with fighting, drunkenness, and threatening an officer's life, charges which certainly could have punished criminally.[12] Although this Court did not specifically refer to this possibility, it implicitly rejected the basis for the Court of Appeals decision, namely that "counsel must be provided where a prison rule violation may be punishable by state law." *Wolff v. McDonnell,* 418 U.S. at 573, n. 20. Rather, in reaching what this Court considered to be a reasonable accommodation between the interests of the inmate and the needs of the institution stated:

> "The insertion of counsel into the disciplinary process would inevitably give the proceedings a

[12]See Nebraska Revised Statutes sections 28-411; 28-743; 28-821.

> more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings." *Id.* at 570; *see Goss v. Lopez,* 419 U.S. 565, 584 (1975).

Certainly the considerations which led the Court to this conclusion have not changed. The practical problems which would inevitably result from the introduction of counsel into this setting, *see Gagnon v. Scarpelli,* 411 U.S. 778, 787-788 (1973), remain the same. The disciplinary hearing process which thus far has been an informal proceeding would of necessity be transformed into a form of adversary hearing.

> "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the [inmate] is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy."[13]

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[13]Friendly, *"Some Kind of Hearing,"* 123 U.Pa.L.Rev. 1267, 1288 (1975).

In the prison setting the potential for volatile effects resulting from another adversarial proceeding is incalculable. "[P]risons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boling point. . . ." *Braxton v. Carlson,* 483 F.2d 933, 941 (3d Cir. 1973).

A primary responsibility of State prison officials is to avoid such disruptions[14] and prevent escapes, assaults, and similar misconduct. The summary disposition of infractions is essential to the identification and isolation of potential problems. Major problems can be prevented by prompt and certain response to infractions. The ability to act promptly is essential, and the summary disciplinary hearing serves that purpose well. To delay[15] those proceedings or subject them to adversary concepts which formalize and slow the response, seriously impairs the ability of prison officials to carry out their responsibility to maintain security.

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[14]"In considering plaintiff's claim that the disciplinary procedure at Green Haven denies him due process, we recognize that prison officials are not dealing with a group of genteel citizens noted for their law-abiding characteristics. On the contrary most present a constant threat of unruliness and have already engaged in serious anti-social activities leading to their imprisonment." *Carothers v. Follette,* 314 F.Supp. 1014, 1027 (S.D.N.Y. 1970).

[15]Delaying disciplinary hearings until the prosecuting authorities decide whether to proceed against the inmate in the courts is the only viable choice afforded petitioners by the decisions below. Reluctantly they have adopted it throughout the California State prison system. See Rules and Regulations of the Director, DP-4508, reproduced in the Appendix to the Petition, pages xx-xxi. This procedure has been objected to by the plaintiff inmates in this case and has caused a serious problem in the maintenance of prison discipline. It is unnecessary since over 95% of all prison rule violations which may also be criminal acts are never prosecuted.

Discipline is directly related to the concept of security. It is established by the inmate's knowledge that rules infractions will be dealt with promptly. It is diminished by interposing procedural obstacles which prevent its operation. It seems clear that if the right to counsel, who presumably will be bound to exercise his familiar techniques, has any effect on prison discipline, such effect would be neutral at best and adverse in all but the most stable of institutional environments.

> "We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses and written record could be self-defeating. We are apprehensive of the volatile effect such adversarial proceedings could have on internal prison control and stability. We fear that prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point by formal adversarial proceedings often involving varying shades of minor infractions." *Braxton v. Carlson,* 483 F.2d *supra* at 941.

The rehabilitary function of the disciplinary hearing has been judically recognized. A prison disciplinary committee

> ". . . is not merely a guilt adjudicating disciplinary body. It is also part of the rehabilitation and correctional system for determining the institutional program and service to which the inmate should be referred." *Id.* at 939.

In summary, the prison disciplinary hearing is a complex proceeding with separate but interrelated func-

tions. To allow prisoners the assistance of counsel would destroy the ability to accomplish several of those functions.[16]

At current disciplinary hearings there is neither prosecution nor defense counsel. The proceeding is not adversarial. Imposition of counsel rights would probably require counsel for both sides and a lawyer to act as a hearing officer. Equal protection would demand that indigents have appointed counsel. The nature of the entire process would change from a summary hearing to a judicial proceeding. Rather than shaping the hearing to match the function, it would be allowing the hearing to shape the function.

II

THE COURT OF APPEALS' DECISION UNDULY CIRCUMSCRIBES CALIFORNIA PRISON ADMINISTRATOR'S DISCRETION

A) Ability to call witnesses

In its initial opinion the Court of Appeals conferred on the accused inmate virtually unlimited authority to call any witness he wished in his defense.

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[16]Because the nature of the disciplinary hearing is essentially non-judicial, we question what use counsel would serve. ". . . . [F]ormal rules of evidence would be entirely inappropriate at a disciplinary proceeding. To dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information. Since, in addition, there is no likelihood that substantial rights would be sacrificed if a prisoner failed, for example, to raise a proper objection or to take a timely appeal, the need for legal skill is less acute here than in *Mempa* . . . ." *Sostre v. McGinnis*, 442 Fed.2d 178, 196 (2nd Cir. 1971), cert. denied, 404 U.S. 1049; 405 U.S. 978.

Clutchette v. Procunier, 497 F.2d at 818. This "Right to Present Witnesses" was subject only to the authority of the disciplinary committee "to limit the number of witnesses called to prevent repetitiousness. . . ." *Clutchette v. Procunier*, 497 F.2d at 818. Subsequently, this Court recognized that:

> "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reasons for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazard presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case." *Wolff v. McDonnell*, 418 U.S. at 566.

Yet the "Right to Present Witnesses" portion of the Court of Appeals initial opinion was not modified on rehearing. Hence, all prison officials in the territorial jurisdiction of the Ninth Circuit may not refuse to call a witness requested by an inmate for any reason other than "to prevent repetitiousness." Though California prison administrators do not object to giving reasons for not calling witnesses requested by an inmate,[17] they do object to the Court of Appeals' inflexible rule which they submit is "untenable as a constitutional matter". *Wolff v. McDonnell*, 418 U.S.

[17]See Rules and Regulations of the Director, DP-4507, reproduced in the Appendix to the Petition, page xviii.

at 566. We ask that we be given the discretion to control the calling of witnesses.

B) Confrontation and Cross-Examination

In its initial opinion, the Court of Appeals also held that inmates had the right to confront and cross-examine their accusers. A right which that court held transcended almost every other consideration. *Clutchette v. Procunier,* 497 F.2d at 818-820. Recognizing that the right to confrontation and cross-examination presented the greatest hazard to institutional interests, and that an adequate basis for decision in prison disciplinary cases can be reached without such rights, this Court has concluded that the Constitution does not require their imposition. *Wolff v. McDonnell,* 418 U.S. at 567-568. Whether, in any given case, confrontation and cross-examination would be helpful in prison disciplinary proceedings, is committed by this Court to the "sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569. On rehearing the Court of Appeals purported to curtail its extension of these rights to conform to *Wolff*. However, an examination of that "modification" reveals that it is in effect a republication of unlimited rights with respect to infractions of prison rules which can also be punished as crimes.[18]

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[18] "Whenever a prisoner requests and is denied the privilege of confrontation and cross-examination in a disciplinary proceeding in which a serious sanction can be imposed *(excluding a proceeding for an infraction that is also a crime)*, the prison authorities must enter in the record of the proceeding and make available to the prisoner an explanation for the denial." *Clutchette v. Procunier,* 510 F.2d at 616. (Emphasis added)

In all other disciplinary hearings the court's purported modification still imposes on prison administrators an inflexible rule which is "untenable as a constitutional matter." *Wolff v. McDonnell,* 418 U.S. at 566.

With respect to serious infractions (other than infractions which can also be punished as crimes) the Court of Appeals, under the aegis of providing a method by which the exercise of discretion by prison administrators could be reviewed, in fact limited that discretion by permitting only four grounds for its exercise *i.e.* risk of refusal, unmanageability, disruption and the safety of prison personnel. *Clutchette v. Procunier,* 510 F.2d at 616. We have no objections to recording the reasons for refusal but ask that this Court restore such interests as avoidance of resentment, speed of action, maintenance of control, assisting the rehabilitative process and indeed all the interest factors mentioned by this Court in *Wolff v. McDonnell,* 418 U.S. at 568-569. We ask the Court to strike this portion of the Court of Appeals' opinion.

> "There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. *However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases.* Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there

> would be a limited basis for upsetting such judgments. The better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell*, 418 U.S. at 569. (Emphasis added)

In its initial opinion the Court of Appeals relying on cases discussing due process safeguards appropriate in a free society or in parole and probation settings, extended, virtually without limit, the rights to confrontation and cross-examination. The Court of Appeals held those rights transcendent over all other countervailing governmental or private interests including even those of other inmates be they victims or witnesses.[19] On rehearing the Court of Appeals excepted from the modification of its previously extended rights to confrontation and cross-examination disciplinary hearings involving infractions which are also punishable as crimes. See footnote 18 supra page 33.

By excepting infractions which may possibly be punishable as crimes from its subsequent modified opinion, this may well mean that the first opinion is in full force and effect as to these hearings. This means full trial-type rights of confrontation and cross-examination. But this Court ruled otherwise in *Wolff*

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[19]This Court in *Wolff* expressed concern for the safety of the victim, or witness inmate. Yet, in the opinion of the Court of Appeals, these rights of the accused inmate are so paramount that a victim or witness inmate may have to subject himself to segregated custody. *Clutchette v. Procunier*, 497 F.2d at 819.

noting it is inappropriate to transplant procedural due process concepts from the free society to the prison society and concluded that confrontation and cross-examination are not fully applicable to prison disciplinary hearings.

> "We think that the Constitution should not be read to impose the procedure at the present time and that adequate basis for decision in prison disciplinary cases can be arrived at without cross-examination.
>
> Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska and the Federal Government, to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle." *Wolff v. McDonnell,* 418 U.S. at 568.

The California prison administrators ask that the discretion so fleetingly enjoyed by them after *Wolff* and before second *Clutchette* be restored. We ask that the parenthetical exclusion of infractions also possibly punishable as crimes from the procedures afforded by *Wolff* be disapproved.

C) A decision based on the evidence presented

The Court of Appeals' opinion precludes the disciplinary committee from considering information which was not presented at a hearing attended by the inmate. This holding is premised on the grounds that

any other procedure would violate the inmate's right to confrontation and cross-examination. *Clutchette v. Procunier*, 497 F.2d at 820. Although the Court of Appeals purported to modify its opinion in accordance with *Wolff* so that confrontation and cross-examination are not required in every disciplinary hearing, [see *Clutchette v. Procunier*, 510 F.2d at 615-616] that court did not modify its requirement that the disciplinary committee must make its fact-finding determinations based solely on evidence presented at a hearing attended by the accused inmate. Petitioners respectfully submit this requirement goes beyond constitutionally mandated minimums of procedural due process for prison disciplinary proceedings and unduly restricts their discretion.

The Nebraska regulations challenged in *Wolff* provided that the disciplinary committee could conduct additional investigation if it desired after the hearing was held and before punishment was imposed. *Wolff v. McDonnell*, 418 U.S. at 553. The twin safeguards of "advance written notice" and "a written statement of the factfinders as to the evidence relied upon" [*Wolff v. Donnell*, 418 U.S. at 563-564] provide the accused inmate an opportunity to reply to any evidence against him upon which the disciplinary committee may rely in reaching its decision. But, the committee should be free to receive and consider information not made available to the accused inmate. *Wolff v. McDonnell*, 418 U.S. at 565. Petitioners respectfully submit that procedural due process requires only that the accused inmate be given an opportunity to respond to any evidence adverse to him which may be consid-

ered by the disciplinary committee before reaching its decision. He can be afforded this opportunity either by appearing in person before the committee or by submitting a documentary response.

The requirement that the disciplinary committee file a written statement of the evidence relied upon, including the reasons for the discipline imposed, *Wolff v. McDonnell,* 418 U.S. at 564,[20] renders unnecessary the imposition of the additional procedure that the decision of the disciplinary committee be based solely on evidence presented at a hearing.

III

THE COURT OF APPEALS HAS IMPOSED PROCEDURES ON CALIFORNIA PRISON ADMINISTRATORS BEYOND THE MINIMUM STANDARDS REQUIRED BY THE FEDERAL CONSTITUTION

The relationship of the State and the Federal judiciary can be abrasive and sometimes is appallingly so. It is, of course, the clear constitutional duty of the Federal judiciary to ensure that the individual states respect and honor those rights guaranteed to its citizens by the United States and this Court is, excepting only the power of the People to amend, the final arbiter of what the Constitution commands. We have no argument with the propositions that the Federal Constitution has entered every cranny of the state

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[20]This procedure was also ordered by the Court of Appeals [*Clutchette v. Procunier,* 497 F.2d at 820], and is incorporated in the petitioners' current rules for inmate discipline. See Director's Rule DP-4507, Appendix to the Petition, p. xx.

prisons and that it is the duty of all Federal Courts to see that it is honored. The Civil Rights Act (Title 42 USC 1983) provides a vehicle for entry.

The question to which we address ourselves is—who delineates the perimeter of the Federal Constitution in the setting of state prisons. Where this court has spoken, there is no room for argument, it delineates the constitutional minima, the pilings on which the sister states may build their separate houses. Any divergence by the states from these basics must of course be corrected and we doubt neither the power nor the ability of the federal district courts, as supervised by the Courts of Appeal and this Court, to so act. The federal district courts should be guided however by this Court's expression of confidence that they will remain "mindful of their delicate role in the maintenance of proper federal-state relations. . . ." *Townsend v. Sain*, 372 U.S. 293, 318 (1963).

With respect, we insist that much of the problem facing both prison administrators and this Court has been due to a series of lower federal court decisions, each proclaimed by its adherents to be "seminal", which purport to add new federal constitutional rights or recognize newly emerging rights. We do not say that the lower federal courts should not indulge in this process. On the contrary, it has long been the pride of the American law that it had many laboratories each formulating its solutions to particular problems within the constitutional framework. But we do submit that when the lower federal courts do other than apply the letter of the Constitution, as

propounded by this Court, they should confine themselves to federal territorial institutions. In short, in the context of state penal institutions, if there is a lacuna, it is for the state courts or prison administrators to fill it. If there is an advance, it is for the state courts or administrators to make it. Subject always to this Court's power to reach out and correct aberrations beyond the constitutional pale or declare new due process safeguards.

> "The better course at this time, in a period where prisons practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569.

This Court has expressed a reluctance to enshrine more than the essentials of fair procedure as constitutional imperatives, even though they do not necessarily nor even probably comport with the views of the members of this Court as to socially desirable criminal procedures. *McGautha v. California,* 402 U.S. 183, 220-221 (1971). The Constitution, which marks the limit of the authority of federal courts in cases challenging state procedures, does not guarantee procedures that are the "best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology. . . ." *Id.* Since *McGautha,* one of Mr. Justice Harlan's last opinions, this Court has accepted his notions of due process and federalism—that the Constitution should be construed as setting only threshold standards of rudimentary fairness, with further embellishments of procedure left to the states and the federal courts as independent

jurisdictions—in several cases. See, e.g., *Ross v. Moffitt,* 417 U.S. 600, 609-612, 618-619 (1974); *Cupp v. Naughten,* 414 U.S. 141, 144-146, 149-150 (1973); *Chaffin v. Stynchcombe,* 412 U.S. 17, 21-23, 29-35 (1973); see also Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court,* 85 Harv. L. Rev. 382, 388 (1973).

The states have a recognized peculiar expertise and special interest in resolving prison problems. *Preiser v. Rodriquez,* 411 U.S. 475 (1973). California's prison administrators and courts have shown a concern for, and a sensitivity to, the plight of parolees, *In re Strum,* 11 Cal.3d 258, 113 Cal.Rptr. 361 (1974); probationers, *People v. Coleman,* 13 Cal.3d 867, 120 Cal. Rptr. 384 (1975), and inmates, *In re Prewitt,* 8 Cal. 3d 470, 105 Cal.Rptr. 318 (1972). Unlike federal courts, state courts are not constrained by the notions of federalism to limit their demands for procedural fairness to the rudimentary. They can and do in the exercise of their supervisory powers fashion extensive and detailed procedures. Compare, *People v. Coleman,* 13 Cal.3d at 888, 120 Cal.Rptr. at 401. Hence, litigating these questions in the state courts serves not only the State's interest in having internal prison matters reviewed initially in its own courts, but also the interests of the inmates since state courts are free to fashion relief more extensive than federal courts properly can.

This view of the proper federal-state relationship is no stranger in the Courts of Appeal. In the instant case, Kilkenny, J. dissenting said:

> "If the court finds that the procedural due process safeguards required by *Wolff* are recognized in the current rules and regulations, the case should be dismissed. Otherwise, the court should direct appellants to amend the rules and regulations to comply with such safeguards." *Clutchette v. Procunier,* 510 Fed.2d at 616.

And, in *Gomes v. Travisono,* 510 Fed.2d 537, 541 n.4 (1st Cir. 1974), a unanimous court held their duty to be discharged when they had conformed their previous decision to *Wolff*. We submit that the tide of federal litigation will ebb when inmates realize that the federal watchword is circumspection and not circumnavigation.

If a lower federal court feels itself compelled to be "seminal", let it cast its seed on federal ground; let it build its landmark on federal property; let it engrave its initials on the stone of federal prisons.

CONCLUSION

The only relief available to respondents in federal court would be an injunction enjoining the prospective enforcement of invalid prison regulations. *Wolff v. Donnell,* 418 U.S. at 555. They are not entitled to retroactive application directing expungement from their prison records of previous disciplinary proceedings conducted without affording these minimum procedural due process safeguards or money damages. *Cox v. Cook,* ..... U.S. ....., 43 U.S. Law Week 3513 (74-751 Decided March 24, 1975); *Wolff v. McDonnell,*

418 U.S. at 573-574. The current rules and regulations of the California Director of Corrections setting forth the procedural safeguards to be afforded in prison disciplinary hearings are reproduced in the Appendix to the Petition, pp. ix through xxviii. We submit they comport with, and exceed, any minimum procedural due process safeguards required by the Constitution and therefore respectfully request this Court reverse the decision of the Court of Appeals for the Ninth Circuit and remand the case with directions to dismiss.

August 5, 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1194

JERRY J. ENOMOTO, *et al.*,

Petitioners,

v.

JOHN WESLEY CLUTCHETTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Roberts v. Taylor, 390 F.Supp. 705 (D.R.I. 1975) . . . 39, 52, 54

Sands v. Wainwright, 357 F.Supp. 1062 (M.D.Fla.) rev'd on procedural grounds, 491 F.2d 417 (5th Cir. 1973) 36, 39, 43, 55

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United States v. Soloman, 509 F.2d 863 (2d Cir. 1975) 42

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Walker v. Hughes, 386 F.Supp. 32 (E.D.Mich. 1974) . . . 63, 71

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California Penal Code

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Other Authorities

American Bar Association, Standards Relating to Probation, 5.3 44

American Bar Association, Survey of Prison Disciplinary Practices and Procedures (1974) 53, 67, 72

Assembly Select Committee on Prison Reform and Rehabilitation, Administrative Segregation in California's Prisons (Sept. 1973) 18

Burger, "No Man Is An Island," 56 A.B.A.J. 325 (1970) 73

Carlson, The Federal Prison System: Forty-five Years of Change, Federal Probation, 37 (June, 1975) 73

Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267 (1975) 11, 71

Model Rules and Regulations on Prisoners' Rights and Responsibilities (West Pub'g Co. 1973) 54, 71

National Advisory Commission on Criminal Justice Standards and Goals, Corrections (1973) 44, 54, 71

Note, Judicial Intervention in Corrections: The California Experience–An Empirical Study, 20 U.C.L.A. L. Rev. 452 (1973) 69

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967) 54, 72

Vanderet, Procedural Due Process in California Prisons, California State Bar Journal, 668 (Nov.-Dec. 1973) 51

IN THE

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

The district court and the Court of Appeals determined—and it is not contested in this Court—that the consequences of disciplinary proceedings at San Quentin are sufficiently serious to require procedural due process safeguards against error or arbitrariness, and that San Quentin's disciplinary fact-finding procedures in effect when this action was brought did not comply

with rudimentary due process. The questions presented to this Court are:

1. Whether a prisoner accused of misconduct that also constitutes a crime, and whose case may be referred to the District Attorney for criminal prosecution, may be subjected to severe disciplinary punishment without a hearing that protects his Fifth Amendment privilege against self-incrimination.

2. Whether the Court of Appeals erred in its determination that accused prisoners have the right to call witnesses on their own behalf, subject to reasonable restrictions.

3. Whether the Court of Appeals erred in holding that when the prison officials determine to deny the right of confrontation and cross-examination to a prisoner, they must state the reason or reasons therefor and that such reasons must reasonably relate to the needs of prison security.

4. Whether the Court of Appeals properly required the prison officials to base their decisions in disciplinary hearings on the evidence presented at such hearings.

STATEMENT OF THE CASE

I.

SAN QUENTIN DISCIPLINARY PROCEEDINGS AT THE TIME THIS ACTION WAS COMMENCED.

A. Introduction

The district court made detailed findings of fact

(A155-166),[1] establishing that the consequences of disciplinary proceedings at San Quentin at the time this action was commenced were sufficiently serious to require procedural safeguards against error or arbitrariness. The prison officials–petitioners in this Court–discuss in their brief only the disciplinary proceedings in the case of individual plaintiff Clutchette. They state only the officials' version of the incident and conclude that Clutchette suffered only minor changes in his status–transfer to isolation, loss of several privileges and referral to the District Attorney for possible prosecution–as a result of the proceedings.[2] As to the underlying incident, petitioners overlook Clutchette's detailed affidavit (plaintiffs' Exhibit 1, introduced in evidence at A94), setting forth a very different version of what actually happened–a version establishing plaintiff's innocence of the charge. It is quite misleading for petitioners to state only the officials' side of the story, because the district court expressly declined "to pass on the truth or veracity of the allegations" contained in the officials' reports or to make any finding on "the questions of guilt or innocence" (A92,93). Respondents–the plaintiffs in the district

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[1]Citations to "A" refer to pages of the Single Appendix in this Court.

[2]The prison administrator's testimony was actually as follows:

"Q. What punishment did you impose on Clutchette?

"A. Well, there was–referred to the District Attorney, 29 days isolation, 29 days cell status and a 60 days loss of privilege. . . ." (A52).

court—were prepared to offer proof as to the underlying disciplinary incident, but since the court was concerned not with the facts of the incident but with the disciplinary *procedures*, there was no evidence taken and no finding as to what Clutchette did or did not do to merit disciplinary punishment (e.g. A93-94).

Moreover, petitioners' narrow focus on Clutchette's individual case disregards the crucial considerations that (1) this has been maintained as a class action involving punishments that may be imposed on *all* San Quentin prisoners regardless of their status; (2) in judging what procedural safeguards are appropriate, it is the possible range of punishments that must be considered, and not simply the punishment imposed in a particular case;[3] and (3) there is undisputed evidence of extremely serious disciplinary consequences befalling other San Quentin prisoners (see R288, 326, 352, 362-376).[4] Accordingly, it is important to consider the range of serious punishments that San Quentin prisoners may be subjected to when they are found guilty of a serious infraction. As the district court found, the most serious disciplinary punishments following a finding of guilt of some prison infraction are (1) sentence to isolation, (2) confinement to the Adjustment Center or segregation, (3) referral to the Adult Authority regarding the prisoner's parole, (4) assessment of damages or forfeiture of earnings, and (5) referral to the District Attorney for criminal prosecution.[5]

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[3]Cf. *Duncan v. Louisiana*, 391 U.S. 145, 159-60 (1968).

[4]Citations to "R" refer to pages of the record and supplemental record before this Court.

[5]There is no legislative sanction for these punishments, unlike the situation in *Wolff v. McDonnell*, 418 U.S. 539, 545, n.5 (1974). These are punishments that California officials have created on their own, without express warrant by elected representatives.

B. Consequences of Disciplinary Proceedings

1. *Sentence to isolation.*

Isolation is a form of solitary confinement. The prisoner is transferred from the general prison population to an extremely restrictive form of confinement that cuts him off from all prison programs and other prisoners. The harsh conditions of life in isolation are described in detail in the district court's findings (A161-162).

2. *Confinement to the Adjustment Center or Segregation.*

Although confinement to isolation could not exceed 30 days, confinement to the "Adjustment Center" or segregation could be *indefinite*. Indeed, as a prison administrator testified, and as the district court found, a prisoner could remain there for the duration of his sentence (A73, 162-63). Again, such confinement operates to isolate the prisoner from all prison programs and meaningful contact with other prisoners. The conditions of life in the Adjustment Center or segregation are described in factual detail by the district court (A162-64).

3. *Referral to the Adult Authority regarding parole consideration.*

Under California's indeterminate sentence law (Cal. Penal Code §§1168, 3020 and 5077), criminal offenses

carry statutorily prescribed minimum and maximum prison terms. Judges merely sentence convicted persons to "the term prescribed by law." The actual time served is determined by the California Adult Authority (A164-65). Each year, a prisoner's case is considered by the Adult Authority, which may postpone the case for another year, set a maximum sentence or set a parole release date (A165).

A Resolution of the Adult Authority requires that a report of all disciplinary actions be presented to the Authority at the time it makes its annual decision whether to set the term of a prisoner's sentence and grant parole (A165, 58, 74). As the district court found, a prisoner's behavior in prison is a key factor in the Authority's decision-making process (A165). A serious disciplinary infraction, especially one involving violence, will obviously affect the Adult Authority's determination and result at least in a year postponement, if not in a longer fixed term of incarceration. The record here shows denials of parole because of disciplinary incidents (R328, 332).

In addition, if the prisoner is found guilty of a disciplinary offense occurring after the Adult Authority has set a sentence or parole date, the offense must be reported to the Authority for immediate action (A165-66). The disciplinary committee is authorized to recommend that the Authority rescind the parole date (A166,58-59).[6] Recommending against a parole date is

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[6]The California Supreme Court has held that a single disciplinary offense is sufficient cause for the Adult Authority to rescind its parole release order and reset the prisoner's sentence at the statutory maximum. *In re McLain*, 55 Cal.2d 78,357 P.2d 1080(1960); see also *In re Prewitt*, 8 Cal.3d 470,503 P.2d 1326 (1972)

probably the most serious disciplinary punishment (A58-59).[7]

4. *Assessment of damages or forfeiture of earnings.*

Another of the sanctions that the disciplinary committee could impose is to levy upon the meager earnings of a prisoner to pay the cost of any property damage. The committee could also recommend that a prisoner's future prison wages be forfeited, regardless of whether there is any property damage. The latter sanction is, in effect, a fine (A166). The San Quentin Institution Plan permits assessments for amounts up to $100 by a hearing officer acting alone (ID-III-08), while the disciplinary committee is authorized to impose assessments in excess of that amount and, in effect, to garnishee the prisoner's future earnings to cover the assessment (ID-II-06). These actions can cause a prisoner great hardship. Even if the amount of the assessment would be relatively small for an employed person in the free world, it leaves the prisoner totally without funds to purchase necessaries from the prison

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[7]Respondents in this case have not challenged "the very fact or duration" of their custody and have not sought "immediate or more speedy release," so *Preiser v. Rodriquez*, 411 U.S. 475 (1973), does not apply. See *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Respondents do not seek restoration of any good time credits (there are none in California) and do not seek immediate or earlier parole. Respondents merely seek a declaratory judgment and an "injunction enjoining the prospective enforcement of invalid prison regulations." *Wolff, supra.*

canteen like toilet articles, tobacco, candy, paper, postage stamps, writing materials, etc. (R328).[8]

5. Referral to the district attorney for criminal prosecution.

Many disciplinary offenses also constitute crimes. For example, the disciplinary committee adjudicates cases of assault, possession of weapons, drug offenses, and even homicide, all of which can be criminally prosecuted (see, e.g. R288, 326-78, 362-76). On the basis of its findings, the disciplinary committee may refer the case to the District Attorney for prosecution (A157, 167-168).[9] The special procedures used at San Quentin in disciplinary proceedings involving conduct that could also be criminally prosecuted are described *infra* at pp. 14-16.

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[8]The Court in *Wolff v. McDonnell* recognized that due process is required not only when the government seeks to deprive a person of liberty but also when property interests are at stake. 418 U.S. at 557-58. Levying on a prisoner's account without due process would impermissibly deprive the prisoner of his property. See *German v. Schmidt*, 330 F.Supp. 480 (W.D. Wis. 1971). Deprivation of a property right is of course remediable under 42 U.S.C. §1983. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

[9]The penalties for in-prison assaultive crime are very severe. For example, assault with a deadly weapon carries a life sentence (without possibility of parole for 9 years). Cal. Penal Code §4500. Assault on an officer resulting in death is a capital crime. *Id.*

C. Procedures used at San Quentin to adjudicate disciplinary offenses.

The San Quentin Institution Plan in effect when this case was brought spoke in terms of "Disciplinary Hearing Courts," "charges," "pleas," and "adjudication," but mandated none of the procedures traditionally regarded as essential to fair and reliable fact-finding. The disciplinary process was succinctly summarized by the Court of Appeals:

> "Under the disciplinary procedures existing at the time of commencement of this lawsuit, an accused inmate was visited by a hearing officer within 24 hours of an alleged infraction. The officer orally informed the prisoner of the charges against him. The officer could impose sanctions for minor infractions without any further investigation or hearing, but serious offenses were referred to a disciplinary committee. At the committee hearing, the complaint and, in some cases, a summary of supplemental reports were read to the inmate (but not shown to him), and he was then given an opportunity to explain his conduct. The decision of the committee was recorded and forwarded to an associate warden for approval." *Clutchette v. Procunier*, 497 F.2d 809, 815 (9th Cir. 1974).

The district court made detailed findings of fact regarding how the disciplinary procedures worked in practice. The court considered the presence or absence of the following components of rudimentary due process:

1. *Notice.*

The only notice given San Quentin prisoners accused of a disciplinary offense did not fairly inform them of

the specific misconduct with which they were charged and thus did not permit preparation of a defense. The accused was given a simple "notice of complaint", but all it included was the number and title of the general *rule* the prisoner was charged with having violated; it did not describe the actual conduct charged or the particular facts to be proved (A178). Thus, it only stated something like "D1201, Inmate Behavior" or "D1202, Disobeying Order," without explication.[10] There were no allegations of the act or behavior considered to violate some broad general rule (A156).

Although no adequate notice was given to the prisoner, the officer reporting the disciplinary offense was required to specify the facts in writing on a prison Form CDC-115. The Form 115 might be supplemented by additional reports, but these were not required. Despite the preparation of the Form 115 and any additional reports, accused prisoners were not permitted to see them (A155). The officials offered no evidence as to why the Form 115 and any supplemental reports could not be given to the accused prisoner so that he would have adequate notice of the charges against him.[11]

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[10]A prison administrator testified that the notice of complaint stated "exactly what the charge is" (A34). But, as the notice in evidence (court's exhibit 2) shows, he referred only to "the number of the Director's rule and then what the title is" (A35), not the facts of the alleged offense. The district court properly found that the only notice given was the uninformative number and general title (A156).

[11]It is the *current* practice at San Quentin routinely to provide accused prisoners with the Form 115 and with any "non-confidential" supplemental reports. (R296, Rule DP-4503(2)).

2. *Impartial tribunal.*

The San Quentin disciplinary committee was (and is) composed solely of prison officers. The disciplinary procedures in effect when this case was heard did not preclude the officer accusing the prisoner from sitting on the disciplinary committee (A157). Although a prison administrator acknowledged that this was undesirable, it in fact occurred in plaintiff Clutchette's case, when a lieutenant whose report was a part of the evidence also sat on the disciplinary committee and when an associate warden, whose report was also part of the evidence, was both consulted as to the proper disposition and then "reviewed" and approved the disposition (A28,42,43,51,74-75,114).[12]

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[12]It is doubtful that a tribunal composed only of prison officers can really be an impartial trier of fact, at least in a serious disciplinary case. But there is no contention in this action that at least one "outside" hearing officer must be used, as several courts have required. See, e.g. *Collins v. Hancock*, 354 F.Supp. 1253 (D.N.H. 1973); *Bundy v. Cannon*, 328 F.Supp. 165 (D.Md. 1971); *Avant v. Clifford*, 67 N.J.496,341 A.2d 629, 646 (1975). Compare *Wolff v. McDonnell*, 418 U.S. at 571, where the Court found no warrant "in the record presented here" for a holding that the tribunal could not be impartial.

Judge Friendly has persuasively argued that if the tribunal is truly unbiased (a safeguard he considers of the highest priority), other procedural safeguards might properly be more relaxed; thus, "agencies might be offered an option of less procedural formality if the decisionmaker were not a member of the agency and of still less if . . . he were not a full-time government employee at all. . . . [A] better answer may not be more insistence on adversary proceedings but less reliance on the bureaucracy for decisionmaking." Friendly, "*Some Kind of Hearing,*" 123 U.Pa.L.Rev. 1267, 1279-80 (1975). Under this reasoning, San Quentin's insistence on a tribunal consisting solely of officers at the prison requires other more rigorous safeguards.

3. *Counsel or Counsel-substitute.*

Regardless of the seriousness of the disciplinary offense or the punishment to be imposed, and regardless of the accused prisoner's lack of literacy, intelligence or ability to speak English, the prisoner was not permitted assistance of any kind at or before the hearing. He could not have a lawyer, a staff member, a law student or any other counsel-substitute help him in preparing a defense or defending himself at the hearing. This was true even though many prisoners accused of disciplinary offenses were (and are) placed in isolation for the entire period between the time of the alleged offense and the hearing, thus rendering it impossible to prepare any defense without the assistance of someone else (A155).[13] Prisoners who happened to have retained or volunteer counsel were not permitted to have their assistance (A158).[14]

4. *Witnesses.*

At San Quentin, the "evidence" in disciplinary hearings consisted solely of written reports (A158). The

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[13]Petitioners' assertion that prisoners are allowed to present written statements from "other inmates, correctional officers, or civilian witnesses" (Brief for Petitioners, p. 10) is pure fancy in a serious disciplinary case, for there is no method by which a prisoner in isolation has access to such persons or can prepare witness statements.

[14]Plaintiff Clutchette's attorney requested that he be permitted to attend the hearing, to present a civilian witness and to defend Clutchette at the hearing, but the request was flatly denied by the officials (R15,16; A121-22).

complaining guard was not even required to be present at the hearing, much less testify or be cross-examined. Nor could the accused call any favorable witnesses, whether they were fellow prisoners, officers, or civilian witnesses (A38).[15]

5. *Confrontation and cross-examination.*

Because the proceedings were conducted solely on the basis of written reports, there was no opportunity for confrontation or questioning of the prisoner's accuser (A158). Indeed, since the complaining guard did not even appear at the hearing, there was not even an opportunity for the disciplinary committee to question him, appraise his credibility or ascertain his opportunity to see, hear or perceive the events.

6. *Decision based on the evidence adduced at the hearing.*

At San Quentin, the disciplinary committee was not prohibited from considering evidence outside the record (A158). A prison administrator testified that he felt free to take into account *ex parte* information casually "passed on" by other prisoners (A39); and guards could also be consulted off the record (A108). Moreover, the

[15]This is true even when a prisoner was accused of a criminal offense and exercised his right to remain silent. (A113,115). Plaintiff Clutchette asked to call the complaining guard as a *favorable* witness, but this was refused (A115).

disciplinary committee was not bound by any standard of proof in determining whether to make a finding of guilt (A159).

7. *Statement of evidence relied on and reasons for disposition.*

The only record of a San Quentin disciplinary proceeding consisted of the notations made on the face of the CDC Form 115 (A159). This included simply the title of the rule violated, the name of the complaining guard, the prisoner's plea (guilty or not guilty), the committee's finding and the punishment ordered. There was no statement of the evidence relied on or reasons for the disposition. Moreover, as noted above, the Form 115 was not even furnished to the prisoner (A158).

8. *Procedures in cases involving conduct that also constitutes a crime.*

As pointed out above, in cases in which the prisoner's misconduct also constituted a crime, one of the consequences of a disciplinary proceeding was referral to the District Attorney for criminal prosecution. In such cases, the accused prisoner was brought before the disciplinary committee and advised of his "*Miranda*" rights.[16] He was specifically advised of his right to remain silent and to have an attorney present

[16] See *Miranda v. Arizona*, 384 U.S. 346 (1966).

during interrogation.[17] He was also advised that anything he said "can and will" be used against him in a court of law (A157). However, if he then requested an attorney as suggested by the *Miranda* warnings (as plaintiff Clutchette did), he was told that this was not permitted until the district attorney interviewed him. If he felt he should speak, he would be questioned about the offense.[18] If he exercised his right to remain silent,

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[17]Counsel for petitioners assert that the prisoner in this situation is "given an opportunity to respond" but "is *not questioned*" (Brief for Petitioners, p. 22). They are mistaken. The San Quentin Disciplinary Plan in effect at the time this case was brought required the *Miranda* warnings for "interrogations" and specified that

> When an inmate becomes or is suspect in the commission of a felony, he must be specifically advised of his Civil Rights before any *questioning* may take place. This condition will apply prior to each time a felony suspect is *questioned about the crime*, either *by* individual interrogators, *Hearing Court Officers*, or *Disciplinary Sub-Committee members*." (ID-III-07) (emphasis added).

The form used in disciplinary hearings involving crimes advised the accused of rights *"while you are being questioned"* (Court's exhibit 4, A47). A prison administrator testified as follows regarding such proceedings:

> "Q. Do you interrogate the inmates at a disciplinary hearing, or do you allow them to make a statement?
>
> "A. At the hearing you can do both. But I would say you start out first by allowing him to state the situation. Then if you have any other questions, then you would ask him." (A110).

Thus, although the committee might not ask questions once the prisoner had insisted on remaining silent (A113), it is clear that otherwise they would seek to interrogate him regarding the alleged crime.

[18]See note 17, *supra*.

the committee nevertheless proceeded to adjudicate the disciplinary infraction, relying solely on the written reports filed against him and hearing no witnesses, favorable or adverse, and no defense (A157).

II.

DEVELOPMENTS SINCE THE DISTRICT COURT'S DECISION

The district court stayed all relief except the requirement that the prison officials submit a new Plan for the conduct of disciplinary committee hearings at San Quentin. In 1971, the officials submitted a new and different disciplinary Plan to the district court and claimed that the Plan met the requirements of that court's decision. Amended Plans were filed in 1972. After remand by the Ninth Circuit, a Second Amended Plan was submitted to the district court on January 17, 1975 (R293). Respondents have taken discovery, submitted new evidence and objected to certain aspects of the latest Plan, but the district court has not yet ruled thereon. None of the new plans was in the record before the Ninth Circuit (see 497 F.2d at 817, n.11). Thus, neither the district court nor the Court of Appeals has passed on any aspect of the Plans under which San Quentin proceedings have been conducted for over three years.[19]

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[19]The California officials summarized the "main differences" between the former disciplinary proceedings condemned by the courts below and their new plans, as follows:

> "While procedures cover several single-spaced pages, here are the main differences between the new regulations and those which were in effect in the past:

The officials voluntarily *implemented* a new disciplinary Plan shortly after the district court's decision. San Quentin has actually been operating under new disciplinary Plans for more than three years, although the officials have never been ordered to implement any new or different Plan at all.

How disciplinary proceedings are now conducted *in practice* is a matter of considerable dispute that has not yet been resolved by the district court (see R196-283, 302-359). The parties have presented new evidence

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—Inmate gets copy of allegations prior to hearing.

—If an inmate is locked up pending a hearing, the institution classification committee is immediately notified, and takes appropriate action to avoid lockup if possible.

—A timely hearing (within 72 hours) is required by an impartial committee which cannot include the officer who wrote the charges, witnesses, or other parties to the infraction.

—An objective investigation is made by an investigator selected from a list of staff volunteers approved by the warden or superintendent.

—Witnesses may be called in to present information at a hearing, and witnesses may be questioned through the assigned investigating officer.

—The inmate gets a copy of the hearing committee decision—which enumerates the facts upon which the decision was based.

—The hearing cannot be held without the inmate being present. If the case is referred to the district attorney for possible criminal prosecution, disciplinary proceedings are suspended and the constitutional rights regarding self-incrimination are safeguarded." (R227-28)

This description of the differences in plans serves to demonstrate how inadequate the former procedures were and how feasible it is to implement better procedures. It is disputed, however, how the new plans operate in actual practice (see *infra*).

dealing with important aspects of current disciplinary practice, and the matter is still under submission in the district court.

As an example of the new evidence and the dispute over current practices, plaintiff Alejandro Ferrel[20] was convicted in a disciplinary proceeding of a homicide on December 28, 1971, after the officials had submitted their first Plan to the district court. The disciplinary procedures used were the same as described in the district court's decision (R288).[21] As a result, Mr. Ferrel was punished by transfer from the general prison population to segregation and he has been confined to segregation ever since December 28, 1971 (except for a brief two-week period in 1973) (R326). Mr. Ferrel has also more recently been convicted of serious disciplinary offenses, but the procedures actually used in his cases do not differ materially from those condemned by the district court (see R326-27). A thorough California legislative study and report of procedures in 1973 concluded that "The arbitrary, unchecked, and overwhelming power of the Disciplinary and Classification Committees is smothering the right of the prisoner to due process." Assembly Select Committee on Prison Reform and Rehabilitation, *Administrative Segregation in California's Prisons*, p. 6 (Sept. 1973). The report recommended that "the practice of punishing men,

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[20]Ferrel was permitted to intervene in this action by stipulation and order dated July 3, 1972 (R285).

[21]It is stipulated that although this was a serious criminal charge, Ferrel was required to plead guilty or not guilty "and asked whether he had anything to say" (R288). When he asked for an attorney, the proceedings were postponed pending referral to the district attorney and the committee assigned Ferrel to segregation *(Id.)*

where their guilt has not been proven, be terminated at once." *Id.*[22]

With regard to disciplinary hearings involving conduct that can also be prosecuted as a crime, the San Quentin procedures have changed significantly since the district court's decision. Beginning with the implementation of the new Plan in the spring of 1972, disciplinary proceedings involving criminal conduct are *postponed* until the termination of any criminal proceedings (see R186-87, 228, 298). That is, no disciplinary hearing is held until either the district attorney determines that no prosecution will be undertaken or criminal proceedings are actually terminated in the state courts.[23] The officials have presented no evidence, based on their experience over several years of postponing disciplinary hearings, that using this procedure has interfered with any correctional interest.[24]

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[22]The report, in considering assignment to segregation specifically at San Quentin, stated that "It would be extremely difficult to conclude that the convicts were given unbiased or fair hearings." *Id.* at 32.

[23]Postponing the disciplinary hearings was an alternative expressly approved by the Court of Appeals. See 497 F.2d at 823.

[24]On the other hand, respondents have presented evidence in the district court that the prison officials have attempted to circumvent due process protections by resorting to the ruse of changing the labels of the proceedings from "disciplinary" to "classification" and thereby depriving prisoners of a hearing (R196-278, 302-332, 350-358). "Disciplinary" hearings are postponed but segregation is ordered by the "classification" committee. Prisoners accused of criminal disciplinary offenses are subjected to segregation immediately following the accusation, without any due process hearing. As of January 1, 1975, of the

The record in this case shows that during an eighteen-month period (both before and after implementation of the new San Quentin Plan), 267 prisoners were referred to the District Attorney for possible prosecution; only 11 were in fact prosecuted (R201). Of 25 prisoners held in segregation as a result of allegedly criminal misconduct, 14 made statements to the disciplinary committee that were thought to be mitigating or exculpatory; several of these were arguably incriminating *(Id.)*. Many of the offenses referred to the District Attorney for possible prosecution are extremely serious, including several homicides (R224,288,331,357,365,366,367,371,375) and assaults with a deadly weapon (R327,369,373). Less serious criminal offenses include, for example, possession of weapons and possession of marijuana (R372, 373).

SUMMARY OF ARGUMENT

It is clear, and not contested by petitioners in this Court, that the consequences of disciplinary proceedings at San Quentin are sufficiently serious to require procedural safeguards against error or arbitrariness and that the procedures used at San Quentin when this action was brought did not meet rudimentary due process. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

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220 men in segregation at San Quentin, 41.3% were there for disciplinary reasons; of these, 61.5% had no hearing. As of January 1, they had been held in segregation on the average for a minimum of 11.3 months (R352, 362-376). Thus, postponing disciplinary proceedings, *unless* it is provided that the prisoner cannot be punished during the pendency of criminal proceedings, presents serious problems. See discussion at p. 45, *infra*.

Whether the *current* disciplinary procedures at San Quentin meet due process requirements has not yet been ruled upon by the district court and was not before the Court of Appeals. The Court of Appeals did specify certain safeguards that must be contained in the San Quentin disciplinary Plan submitted to the district court. We submit that such safeguards are required by due process and must be affirmed. Such safeguards are not inconsistent with *Wolff v. McDonnell.* Disciplinary punishments are significantly more serious in California than in Nebraska, and the Court in *Wolff* expressly said that the decision there was not definitive as to due process requirements in all other cases. Petitioners' four specific arguments are without merit:

I.

Special precautions are required for disciplinary hearings when the misconduct charged can also be prosecuted as a crime. The prisoner's Fifth Amendment privilege against self-incrimination as well as his due process right to be heard in his own defense must be protected.

Under the procedures challenged in this case, the San Quentin prisoner accused of criminal misconduct would be called before a disciplinary committee and warned that anything he said "can and will" be used against him in a criminal prosecution. He would also be told that he had the right to have an attorney present during interrogation, but would not in fact be allowed to have counsel. If the prisoner exercised his right to remain silent at the hearing, the committee would nevertheless

proceed to adjudicate the disciplinary infraction, relying solely upon any written reports filed against the prisoner and without hearing any defense from him.

The courts below correctly observed that this procedure presented even more serious constitutional infirmities than interrogation of a police suspect in the stationhouse, because the police suspect suffers no adverse consequences if he decides to remain silent. In contrast, the accused prisoner at San Quentin would be subject to immediate and serious punishment. For the prisoner, "the trap is unavoidable"—warned that anything he said would be used against him in a criminal prosecution, the prisoner "definitionally prejudices himself" by either (1) remaining silent, sacrificing any defense to the disciplinary charge and thus incurring severe punishment, or (2) speaking in his own defense and risking self-incrimination in a later criminal prosecution.

Numerous decisions of the Court have established that procedures operating to compel self-incriminating statements or to penalize the exercise of the Fifth Amendment privilege are invalid. The San Quentin prisoner's dilemma is even worse because he does not have the advice of counsel in deciding whether to waive his Fifth Amendment privilege or to forfeit his right to be heard in his own defense. Therefore, the courts below were correct in determining that the prisoner accused of criminal misconduct was placed in an unconstitutional dilemma.

One solution for dealing with the dilemma, authorized by the Court of Appeals, is to postpone disciplinary proceedings until after the termination of any criminal proceedings. This is in fact the course

chosen by the San Quentin officials during the past three years. It is a sound solution to the problem except in cases in which the prison officials believe that the accused prisoner must be immediately segregated in order to maintain prison security. Postponement is a viable option in all other cases, in which segregation would not be used as a control device.

In those cases in which the officials insist upon immediate segregation, the Court of Appeals gave the officials a choice: (1) they can either protect the Fifth Amendment privilege by providing counsel for the prisoner at the disciplinary hearing, thus preventing the hearing from being impermissibly coercive; or (2) they can require that the prisoner respond to questioning, and then provide "use immunity" to protect the compelled disclosures.

This Court has recognized that the presence of counsel is needed in many cases to insure protection of the Fifth Amendment privilege. Providing counsel in criminal disciplinary proceedings would be an appropriate solution to the unconstitutional dilemma forced upon the accused prisoner. This is not foreclosed by *Wolff v. McDonnell,* because: (a) this issue was not presented in *Wolff* and, because of California's unique indeterminate sentence law, this case presents a need for counsel that did not exist in *Wolff;* indeed, the California Supreme Court has required counsel in certain of these disciplinary hearings in which the term of incarceration may be affected; (b) the need for assistance of counsel is particularly strong in the context of these proceedings, in which an otherwise uncounseled prisoner would be forced to surrender one of two basic constitutional rights; (c) permitting assistance of counsel need not turn these disciplinary

proceedings into protracted and unwieldy events; (d) there is now empirical evidence on the effect of permitting counsel in disciplinary proceedings, and the Court should not conclude that providing counsel is inappropriate in the absence of evidence that this seriously infringes some correctional interest; and (e) the nation's leading correctional experts now recommend providing counsel in cases like the present one.

The Ninth Circuit's alternative suggestion that "use immunity" be provided has been the holding of most of the courts to consider the issue, and has frequently been ordered by the Court in analogous situations. Use immunity would protect the accused prisoner against the use of statements made in his own defense, thus making it possible for him freely to defend himself. He would not be forced to surrender either the right to be heard or the privilege against self-incrimination. From the State's point of view, no correctional interest would be impaired. Disciplinary hearings could be promptly held and expeditiously conducted. If use immunity is provided, the prisoner must of course be so advised at the disciplinary hearing, and should be provided with counsel substitute.

II.

The Court of Appeals held, as this Court did in *Wolff v. McDonnell*, that prisoners have a right to call witnesses on their own behalf. Such right is not unrestricted. Respondents acknowledge that reasonable restrictions may be imposed, and have not objected to the reasons for not calling witnesses proposed by the

prison officials in their Plan pending before the district court. There is no issue requiring resolution by this Court.

III.

The Court of Appeals required that when the prison officials, in their discretion, determine to deny the right of confrontation in an individual case, they must state the reason therefor and such reason must reasonably relate to the needs of prison security recognized by this Court in *Wolff v. McDonnell*. The officials have expressed "no objections to recording the reasons for refusal" to permit confrontation, and indeed their present Plan, pending before the district court, already provides for documenting reasons for not calling witnesses. To the extent that the Ninth Circuit's decision authorizes confrontation in cases in which the misconduct can also be criminally prosecuted, and to the extent that the court held that confrontation can be denied in individual cases only when the *Wolff* concerns are present, the decision is sound and should be affirmed. Respondents urge that the right is so important to the integrity of the fact-finding process that it cannot be dispensed with *except* in cases in which the *Wolff* concerns predominate. *Wolff* is not inconsistent with this result because: (a) the Court's statements on confrontation in *Wolff* were not necessary to the decision there and, in any event, the differing consequences of disciplinary hearings in Nebraska and California distinguish *Wolff* from the present case; (b) the Court's previous decisions holding

that the right of confrontation is essential to reliable fact-finding demonstrate that the right should not be discarded at least without a showing that it cannot appropriately be used in the prison disciplinary setting; (c) a limited right to confrontation can in fact be implemented without undesirable consequences, as shown by the experience of other prison systems, and the now available evidence of such experience should at least be considered on remand; (d) an appropriately limited right to confrontation makes practical sense in the prison setting, as recommended by the nation's leading correctional authorities; and (e) regardless of the outcome of this case, California officials are required by California Supreme Court decisions to conduct in-prison hearings affording the right to confrontation in certain of these cases, and unless the officials can show on remand that denial of such right in other cases is required by correctional interests, this Court should not hold that there is never any right to confrontation.

IV.

The Court of Appeals required that decisions be based on the evidence presented at the disciplinary hearing. Many decisions of this Court require, as petitioners concede, that "the accused inmate be given an opportunity to respond to any evidence adverse to him which may be considered by the disciplinary committee before reaching its decision." The Court of Appeals based its requirement on a record showing that the San Quentin committee would consider *ex parte* information casually "passed on" by other prisoners and consult off the record with guards and other

officials. Disciplinary hearings would be a sham if the decision-makers were authorized routinely to find facts on evidence kept secret from the accused. Petitioners' present disciplinary Plan does not permit this, and, while a narrow exception for nondisclosure of informants could be considered on remand, petitioners have offered no justification for any such gross departure from settled due process principles.

ARGUMENT

Introduction

Respondents do not dispute the authority of prison officials to administer prison discipline. The necessity for, and the appropriateness of, disciplinary controls is not an issue in this case. The courts below gave full deference to the judgment of prison officials regarding both the type of prisoner conduct requiring disciplinary controls and the kinds of disciplinary punishments that may be imposed. The narrow issues here involve whether prisoners must be afforded procedural safeguards essential to fair and reliable fact-finding before being subjected to punishments substantially altering the nature or prolonging the term of their imprisonment.

The courts below required a rudimentary due process hearing only when warranted because of the severity of the consequences following upon a conviction of guilt. It is clear, and not contested by petitioners in this Court, that such consequences at San Quentin are sufficiently serious to require procedural safeguards against error or arbitrariness and that the procedures

used at San Quentin when this action was brought did not meet rudimentary due process safeguards. See *Wolff v. McDonnell*, 418 U.S. 539 (1974). Therefore, the courts below were plainly correct in condemning the old procedures.

The live issue now is whether the *current* disciplinary Plan *and practice* at San Quentin satisfy rudimentary due process requirements. As pointed out in our Statement of the Case, the new disciplinary Plan was not before the Court of Appeals. Nor has it been ruled upon by the district court, which has taken new evidence as to how the Plan actually operates in practice. This Court should not in the first instance pass upon the constitutionality of the new Plan, especially without any findings by the trial court establishing how the Plan operates in practice.[25] While petitioners have not yet been ordered to do anything they are not doing voluntarily, the Court of Appeals did specify certain elements that must be contained in the Plan on remand. We submit that the Ninth Circuit's decision represents an irreducible minimum of due process and must be affirmed.

As pointed out above, under *Wolff v. McDonnell*, the San Quentin procedures in effect when this action was brought did not afford rudimentary due process safeguards. The prison officials–petitioners in this

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[25]Cf. *Albermarle Paper Co. v. Moody*, __U.S.__ 95 S.Ct. 2362, 2380 (1975). The Plan contains so much ambiguous and discretionary language that evidence of its operation in practice is essential to see whether it has any real effect (see, e.g. R317-18). There is no basis whatever for petitioners' prayer (Brief for Petitioners, p. 43) that the Court should rule on the Plan and "remand the case with directions to dismiss."

Court—do not contend otherwise. The officials do contend that the decision of the Ninth Circuit in certain respects is inconsistent with *Wolff*, or otherwise requires "too much" rudimentary due process. While we will consider petitioners' specific arguments below, it is necessary at the outset to recognize what *Wolff* did decide and what it did not decide.

The *Wolff* opinion is one of the more unusual decisions of this Court, in that the majority expressly and repeatedly states not only that (1) the decision is limited to the record before the Court, but also that (2) the decision is "not graven in stone" and "further consideration and reflection of the Court" is contemplated. 418 U.S. at 572. These factors are important in considering the present case:

1. *Wolff is distinguishable on its facts.*

Wolff involved proceedings in Nebraska prisons. The Court carefully examined the Nebraska statutory and administrative provisions governing disciplinary proceedings, as well as the testimony in the record as to how they worked in practice. The Court referred to the warden's testimony that a "great number" of disciplinary cases were "resolved without contest" and many inmates admitted guilt to an investigator. 418 U.S. at 552, n.10. The Court naturally concluded that it would be inappropriate to require much due process in such cases. In the present case, there is no contention that due process hearings are required except in cases in which there are real factual disputes and the consequences are very serious.

More importantly, the disciplinary consequences to prisoners are more serious in California than in Nebraska—California prisoners suffer greater deprivations of liberty and property. Thus, until the district court's decision in this case, California prisoners could be subjected not only to (1) isolation (the apparent equivalent of solitary confinement in Nebraska),[26] but also (2) *indefinite* confinement to segregation, (3) referral to the parole board for reconsideration or denial of parole, (4) assessment of damages or forfeiture of the prisoner's earnings, and (5) referral to the district attorney for criminal prosecution (A161-171). These serious consequences did *not* befall Nebraska prisoners, so far as the record shows, and thus were not presented in *Wolff*.

The effect of California's unique indeterminate sentence law is of critical importance. As noted above (p. 6, *supra*), the time served by California prisoners is determined not by judges but by the Adult Authority, and a single disciplinary infraction is cause for parole denial or rescission of a parole date already given.[27]

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[26]The Court in *Wolff* held that a due process hearing is required "when solitary confinement is at issue." 418 U.S. at 571, n.19. The Court reasoned that for a "major change in the conditions of confinement" which is "normally imposed only when it is claimed and proved that there has been a major act of misconduct, . . . there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Id.*

[27]As the Court of Appeals noted, because the Adult Authority has not stated reasons for its actions, "the causal connection between a record of a disciplinary offense and an adverse response by the Authority is not always evident," but it is clear that the Authority "can and sometimes does cancel a previously set parole date or reset the inmate's sentence to a statutory maximum on the basis of even minor disciplinary actions." 497 F.2d at 813. The record here shows denials of parole because of disciplinary incidents (R328,332).

This can be far more serious than the deprivation of "good time" credits involved in *Wolff* or, in some cases, than the parole revocation involved in *Morrissey v. Brewer*, 408 U.S. 471 (1972). For example, a California prisoner who is convicted of a serious disciplinary offense will almost certainly lose parole consideration for at least a year; and if he already has a parole date, he can lose it and have his sentence refixed at the maximum (which is frequently life imprisonment). The result is a significant extension of his term of incarceration. In contrast, a prisoner who loses six months' good time credit suffers less serious consequences—a still significant but shorter extension of incarceration. Also, a parolee who has, say, six months remaining on his maximum sentence could be exposed only to six months' incarceration as a result of parole revocation, while the California prisoner denied parole would be incarcerated far longer.[28] In short, because of California's indeterminate sentence law, disciplinary hearings have a special importance not present in *Wolff*.

2. *Wolff is not definitive as to due process in other cases.*

Not only is *Wolff* distinguishable on its facts, but the Court there repeatedly stated that the last word on due

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[28]It is no doubt more typical for the parolee to have longer to serve, and surely the loss of parole liberty is a grievous loss. We use the parole revocation example simply to illustrate that a revocation hearing does not necessarily and in all cases present a risk of greater loss of liberty to the parolee than a disciplinary hearing for a California prisoner.

process has not been spoken. The Court declined, for example, to mandate a general right of cross-examination "at the present time," or "for now". 418 U.S. at 568. The Court went on to say that "at this time" prison practices in this area are "diverse" and somewhat "experimental" *Id.* at 569. Regarding the right to counsel, the Court said it was not ready to require retained or appointed counsel "at this stage of the development of these procedures." *Id.* Finally, in summing up, the Court stated that its conclusions were "not graven in stone" and that further consideration of the problems on a different record was likely. *Id.* at 572. Surely *Wolff* was not intended to stifle development in this field.[29]

In short, the present case cannot be disposed of, as petitioners contend, merely by citation to *Wolff*, without careful consideration of the factual differences reflected by the record and the opportunity this case presents for "further consideration and reflection of the Court". 418 U.S. at 572. With this in mind, we turn to consideration of petitioners' specific arguments that: (1) no special safeguards are required in cases of disciplinary offenses that can also be prosecuted as crimes; (2)

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[29]That the Court did not necessarily disagree with the conclusions of the Ninth Circuit in this case can be seen from its discussion of various lower court decisions. 418 U.S. at 572, n. 20. The Court, while considering what the Court of Appeals held here, did not in any manner criticize or disapprove the Ninth Circuit's decision. Surely, if the Court's position were fixed and it deemed the Ninth Circuit's decision to be inconsistent with *Wolff*, it would have taken the obvious opportunity to say so and not granted a plenary hearing in this case. Compare *Alyeska Pipeline Service Co. v. Wilderness Society*, __U.S.__, 95 S.Ct. 1612, 1628, n.46 (1975).

the Court of Appeals too closely circumscribed the officials' power to deny prisoners the right to call favorable witnesses; (3) the Court of Appeals too closely circumscribed the prison officials' discretion to deny the right of confrontation and cross-examination; and (4) the Court of Appeals erred in requiring that prison officials must base their decisions on the evidence presented at the disciplinary hearings.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT SPECIAL PRECAUTIONS ARE REQUIRED FOR DISCIPLINARY HEARINGS WHEN THE MISCONDUCT CHARGED CAN ALSO BE PROSECUTED AS A CRIME

Under the procedures before the courts below, when a San Quentin prisoner was charged with in-prison misconduct that also constituted a crime, he was brought before the disciplinary committee and advised of his right to remain silent and to have an attorney present during interrogation. He was also specifically advised that anything he said "can and will" be used against him in a court of law (A157,167). However, if the prisoner then requested an attorney, he was told that this was not permitted until the District Attorney interviewed him. If he exercised his right to remain silent at the hearing, the committee nevertheless proceeded to adjudicate the disciplinary infraction, relying solely on any written reports filed against him and without hearing any defense (A157).

In *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), this Court declared that when an individual is in

governmental custody and "is subjected to questioning, the privilege against self-incrimination is jeopardized." It is clear that in San Quentin disciplinary proceedings the accused prisoner was in fact subject to questioning. Thus, the San Quentin Institution Plan required *Miranda* warnings regarding "interrogations,"[30] stating that

> "When an inmate becomes or is suspect in the commission of a felony, he must be specifically advised of his Civil Rights before any *questioning* may take place. This condition will apply prior to each time a felony suspect is *questioned about the crime*, either *by* individual interrogators, *Hearing Court Officers, or Disciplinary Sub-Committee members*. (ID-III-07) (emphasis added).

And a prison administrator testified that the accused could in fact be questioned at the disciplinary hearing.[31] Moreover, the court below recognized that the prisoner's "opportunity to explain" at the disciplinary hearing was in truth a subtle form of interrogation. 497 F.2d at 823. The Court of Appeals accurately described the process as one of stating the evidence against the prisoner and then demanding to know "And what do you have to say about that?" *Id.* The court concluded that a disciplinary hearing is "inherently inquisitive." *Id.*[32] As the court recognized, a discipli-

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[30]*Miranda*-type warnings have been required in California prisons since *People v. Dorado*, 62 C.2d 338, 398 P.2d 361 (1965), which foreshadowed this Court's *Miranda* decision.

[31]See generally note 17, *supra*.

[32]See also *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629, 652 (1975). Thus, with or without *Miranda* warnings it is not surprising that an accused prisoner would be impelled to make statements that may turn out to be incriminating. The record in this case shows instances in which prisoners accused of criminal misconduct made arguably incriminating statements even after receiving the *Miranda* warnings (R201).

nary hearing is "designed to induce revelation of all the facts, including the accused inmate's version of them." *Id.* Indeed, in a serious disciplinary case prison officials would be remiss in performance of their duties unless they tried to elicit a complete factual picture to deal with any possible disturbance.

In short, there is no doubt that San Quentin disciplinary hearings involving criminal misconduct constitute "custodial interrogation" within the meaning of *Miranda*.[33] It makes no difference that the interrogation is not intended to elicit evidence for criminal prosecution and the person questioned is in custody for an entirely separate offense:

> "These differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody . . .
>
> "There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights." *Mathis v. United States*, 391 U.S. 1, 4 (1968); see also *Palmigiano v. Baxter*, 510 F.2d 534, 536-37 (1st Cir. 1974); *Blyden v. Hogan*, 320 F.Supp. 513, 519 (S.D.N.Y. 1970).[34]

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[33]"By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444.

[34]In *Miranda v. Arizona*, the Court said "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in *all settings in which their freedom of action is curtailed in any significant way* from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added).

Further, the courts below pointed out that the San Quentin procedure presented even more serious constitutional infirmities than interrogation of a police suspect in the stationhouse as in *Miranda*. The police suspect suffers no adverse consequences if he decides to remain silent.[35] In contrast, the accused prisoner at San Quentin was subject to immediate and serious punishment unless he could defend himself. The district court found that "the trap is unavoidable"—the prisoner, warned that anything he said may be used against him in a criminal prosecution, "definitionally prejudices himself" by either (1) remaining silent, sacrificing any defense to the disciplinary charge (especially a mitigating circumstances defense) and thus incurring severe punishment, or (2) speaking in his own defense and risking self-incrimination in a later criminal prosecution (A168).[36] Since there is apparently no protection

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[35]Compare *Michigan v. Tucker*, 417 U.S. 433 (1974), where the Court upheld the use of testimony obtained through interrogation without full *Miranda* warnings in a case in which the defendant declined when he was asked if he wished to have an attorney present and the Court pointed out that he was subject to "no legal sanctions" if he remained silent. 417 U.S. at 445. In these circumstances the Court found that exclusion of the testimony was not necessary to protection of the defendant's Fifth Amendment privilege.

[36]A well-reasoned lower court decision recognized that "the dilemma is '. . . likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'" *Sands v. Wainwright*, 357 F.Supp. 1062, 1093 (M.D. Fla. 1973), *rev'd on procedural grounds*, 491 F 2d 417 (5th Cir. 1973) (quoting from *Miranda v. Arizona*, *supra*, 384 U.S. at 464 U.S. at 464-65). The same analysis was made in *Carter v. McGinnis*, 351 F.Supp. 787 (W.D. N.Y. 1972). The inability to make a "free and rational choice" answers petitioners' contention that even

against double punishment—both disciplinary punishment and criminal prosecution—under the double jeopardy clause, see e.g. *United States v. Cordova*, 414 F.2d 277 (5th Cir. 1969),[37] the accused prisoner is

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though the prisoner is "caught between a rock and a hard place" (Brief for Petitioners, p. 24), it is permissible to compel him to make a choice without counsel or other means of defense. See also discussion at p. 42-43, *infra*.

[37]There has never been a well-reasoned decision on the double jeopardy problem. When the consequences of a disciplinary infraction include an increased term of incarceration, we submit that the policies underlying the double jeopardy clause ought to be applied. Compare *Breed v. Jones*, ___U.S.___, 95 S.Ct. 1779 (1975), holding that an adjudicatory finding in juvenile proceedings, coupled with criminal prosecution, violated the double jeopardy clause. One of the reasons for the decision was the "dilemma that the possibility of [later prosecution] presents for the juvenile"; if he is "cooperative" in the juvenile proceeding, "he runs the risk of prejudicing his chances" in the criminal court. 95 S.Ct. at 1791. The procedure allowed "the prosecution to review in advance the accused's defense and . . . hear him testify about the crime charged." *Id.* at 1784. Precisely the same dilemma is presented in the instant case.

Further, because of California's indeterminate sentence law the State has an effective *option* for dealing with the prisoner convicted of criminal misconduct. It (through the Adult Authority) can cause the prisoner to serve an increased term of incarceration on the basis of the disciplinary conviction. Or it can achieve the same result through a new criminal prosecution. That is, the State can satisfy its interest in imposing effective sanctions through the disciplinary process, with far less rigorous procedural safeguards for the accused. A holding that double jeopardy barred a subsequent prosecution would not, therefore, interfere with an important State interest, but would relieve the prisoner from the risk of defending himself in more than one forum and would thus resolve the issue in this case. Cf. *Barrows*

under much greater compulsion to speak than is the suspect in the police stationhouse. If the prisoner exercises his privilege against self-incrimination, the disciplinary committee imposes a serious disciplinary punishment with the prisoner "stripped of any possible means of defense" (A170). This makes the price of silence "costly" and impermissibly penalizes the prisoner's exercise of his Fifth Amendment privilege.[38] As the Supreme Court of New Jersey recently said in a case directly in point, the prisoner's statement in a disciplinary hearing, "in substance if not in form, must be regarded as 'compelled' in the sense that its absence would project the 'grievous loss' entailed in disciplinary punishment. The imminence of punishment affecting his liberty exposes him to a 'penalty' equivalent at least to that involved in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) [and other cases cited in note 38, *supra*]." See

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v. Hogan, 379 F.Supp. 314 (M.D.Pa. 1974) (criminal acquittal bars administrative prison punishment).

The California officials' recent rule change (R381-82), requiring the disciplinary committee to accept the verdict of the court or jury as to guilt or innocence, does not solve the double jeopardy problem since it expressly permits both disciplinary and criminal punishment.

[38]See *Lefkowitz v. Turley*, 414 U.S. 707 (1973); *Uniformed Sanitationmen v. Commissioner*, 392 U.S. 280 (1968); *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Griffin v. California*, 380 U.S. 609, 614 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); Cf. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

Avant v. Clifford, 67 N.J. 496, 341 A.2d 629, 654 (1975).[39]

In *Lefkowitz, supra*, this Court held that a public contractor could not be required, on pain of losing his contracts, to waive immunity or to testify regarding his possibly criminal business dealings. The Court said that any statement in these circumstances must be deemed compelled: "A waiver secured under threat of substantial economic sanction cannot be termed voluntary." 414 U.S. at 82-83. Even though the State had a "strong, legitimate interest in maintaining the integrity of its civil service" (certainly the interest in prison discipline is no greater), the Court held that the contractor must be "protected at least against the use of his compelled answers and evidence derived therefrom." *Id.* at 78.

Applying the *Lefkowitz* reasoning to the present case, it is apparent that any uncounseled prisoner statement to a disciplinary committee must be deemed compelled, as held in *Avant v. Clifford* and the cases

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[39]See also *Palmigiano v. Baxter*, 510 F.2d 534 (1st Cir. 1974); *Jones v. Manson*, 393 F.Supp. 1016 (D. Conn. 1975); *Roberts v. Taylor*, 390 F.Supp. 705 (D.R.I. 1975); *Sands v. Wainwright*, 357 F.Supp. 1062 (M.D.Fla. 1973), *rev'd on procedural grounds*, 491 F.2d 417 (5th Cir. 1973); *Carter v. McGinnis*, 351 F.Supp. 787 (W.D.N.Y. 1973); *Fowler v. Vincent*, 366 F.Supp. 1224 (S.D.N.Y. 1973); *Cf. Melson v. Sard* 402 F.2d 653, 655 (D.C. Cir. 1968); *People v. Coleman*, 13 C.3d 867, 533 P.2d 1024 (1975). These cases hold that the prisoner must at least be afforded "use immunity."

cited in note 39, *supra*.[40] The potential penalties–including an increased term of imprisonment–are at least as serious as economic sanctions. It makes no difference that the penalties are not in form imposed simply because the prisoner invokes the privilege to remain silent, as in *Lefkowitz, Garrity v. New Jersey* and similar cases. In substance, there is no doubt that the prisoner is penalized because of his silence, even though the disciplinary committee may not expressly draw an inference of guilt from the silence. Without any presumption of innocence or rules of evidence, without counsel to offer a defense, and with a tribunal of officers clearly not disposed to give him the benefit of any doubt, the prisoner's silence assures conviction of the offense. The committee simply accepts the charging officer's report at face value, and there cannot realistically be any doubt of the outcome. The prisoner's plight is similar to that of the accused in *Griffin v. California*, 380 U.S. 609 (1965), and *Simmons v. United States*, 390 U.S. 377 (1968). In *Griffin*, the accused's silence worked to his detriment because of the comment thereon presented to the jury. The Court

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[40]The *Lefkowitz* decision also flatly contradicts the assertion of the government in this case that "the privilege against self-incrimination applies directly only to 'criminal' cases" (Brief for United States as *amicus curiae*, p. 49, n.17). *Lefkowitz* said it was settled that the Fifth Amendment entitles a citizen "not to answer official questions put to him in *any* other proceeding, *civil or criminal, formal or informal*, where the answers might incriminate him in future criminal proceedings." 414 U.S. at 77 (emphasis added). See also *Miranda v. Arizona*, 384 U.S. at 467 (privilege applies "to protect persons in *all settings in which their freedom of action is curtailed in any significant way* . . .") (emphasis added). The applicability to all such proceedings was reaffirmed in *Maness v. Meyers*, 419 U.S. 449, 464 (1975), and *Kastigar v. United States*, 406 U.S. 411, 444 (1972).

held that this made exercise of the privilege "costly," 380 U.S. at 614, but it was not by any means a certainty that the silence would both be commented upon and lead to a verdict of guilt. Similarly, in *Simmons* the accused's reluctance to testify on a suppression motion (lest his statements might be used against him at trial) did not necessarily mean that he would be convicted. The point is simply that the prisoner facing serious disciplinary punishment is substantially prejudiced when, as a condition of invoking his Fifth Amendment privilege, he is required to forfeit his right to be heard in defense.[41]

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[41]Petitioners argue that *Crampton v. Ohio*, 402 U.S. 183 (1971) establishes that this does not result in any constitutional deprivation (Brief for Petitioners, p. 25). The Court there held that a separate penalty trial was not constitutionally mandated in capital cases, despite the "tension" between the accused's right to remain silent on the issue of guilt and his right to present mitigating testimony on the issue of punishment. But the analogy is not apt. The accused in a capital case is not "stripped of any possible means of defense" even if he decides not to take the witness stand. He enjoys the presumption of innocence (which is unknown at prison disciplinary hearings) and is protected by the reasonable doubt requirement. Strict rules of evidence govern the State's case against him. He has the right to a decision by a jury selected from a cross-section of the community. He is represented by an attorney who can cross-examine and call witnesses and argue mitigating circumstances to the jury. But the silent prisoner accused of crime in a disciplinary proceeding lacks all these protections.

The California Supreme Court in a scholarly opinion recently addressed itself to precisely this question. See *People v. Coleman*, 13 C.3d 867, 533 P.2d 1024 (1975). It analyzed the kinds of cases that present "the problems of conflicting constitutional rights" when there is the possibility of a criminal prosecution. For example, civil litigation may present a possibility of

Further, unlike all the cases relied upon by petitioners, here the accused is forced to elect between forfeiting either his privilege against self-incrimination, or his right to be heard, without the assistance of counsel.[42] This, coupled with the threat of immediate

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self-incrimination in a later criminal proceeding, but the party in such litigation enjoys "a high degree of procedural protection against arbitrariness." 13 C.3d at 886. At the other end of the spectrum, however, are proceedings which "accord the defendant minimal procedural rights but which have the potential of imposing serious personal deprivations. Prison disciplinary hearings epitomize this class." *Id.* at 885. The California Court reasoned that "if already minimal procedural protections are further eroded by the need to preserve intact the defendants' full rights at a pending criminal trial, there are insufficient safeguards against the imposition of arbitrary deprivations at the [prison disciplinary hearing]." *Id.* at 886. In these circumstances, silence by an uncounseled prisoner cannot be considered a "strategic" alternative. *Id.* at 883. See also *Palmigiano v. Baxter,* 487 F.2d 1280, 1288-89, n.21 (1st Cir. 1974).

The Supreme Court of New Jersey is in accord: "In light of the fewer procedural safeguards available and the limitations placed on the inmate's tools of defense, an inmate's decision to remain silent is tantamount to a sacrifice of his defense." *Avant v. Clifford, supra,* 341 A.2d at 653.

[42]Thus, the defendants in *Chaffin v. Stynchcombe,* 412 U.S.17 (1973), *Brady v. United States,* 397 U.S. 742 (1970), and *United States v. Soloman,* 509 F.2d 863 (2d Cir. 1975), were all advised and represented by counsel when the choices (which were not in any event analogous to the present case) had to be made. In *United States v. Kordel,* 397 U.S. 1 (1970), the accused corporate officer was represented by counsel and was in no sense disabled from fully defending himself. Indeed, the Court twice pointed out that this was *not* "a case where the defendant is without counsel." 397 U.S. at 10, 12. In contrast, as the district court found in this case, the accused prisoner in a disciplinary proceeding who is without counsel and exercises his privilege of

punishment, plainly deprives him of his "free choice to admit, to deny, or to refuse to answer." *Garrity v. New Jersey, supra,* 385 U.S. at 496; he cannot make a "free and rational choice" whether to waive his privilege. *Miranda v. Arizona, supra,* 384 U.S. at 464-65; *Sands v. Wainwright, supra,* 357 F.Supp. at 1093; the choice to defend himself is not made "in the unfettered exercise of his own will." *Malloy v. Hogan, supra,* 378 U.S. at 8. In this sense, the prisoner's dilemma is worse than that of the parties in *Lefkowitz* and all the other cases, who could at least make their choices with the advice of competent counsel.

A common denominator of *Wolff v. McDonnell* and all the due process cases is the accused's right to be heard in his own defense. That is, even if it is determined that the accused prisoner is not entitled to extensive procedural rights, everyone concedes his right to appear and be heard. This right is worthless, however, when the prisoner wishes to exercise his Fifth Amendment privilege, for unless special precautions are taken, he will be defenseless to the disciplinary charge.

Accordingly, the courts below were correct in determining that the prisoner accused of criminal misconduct was placed in an unconstitutional dilemma. The issue then is how best to deal with the dilemma. The Court of Appeals said that it would be permissible

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remaining silent is "stripped of any possible means of defense." (A170). In *DeVita v. Sills,* 422 F.2d 1172 (3d Cir. 1970), a judge faced a disbarment proceeding linked to criminal charges. Not only was the judge represented by counsel and fully able to call and cross-examine witnesses, but he was also given immunity in the disbarment proceeding from use of any statements he might make. But San Quentin prisoners had neither counsel, nor witnesses, nor immunity.

for the officials to postpone disciplinary proceedings until after the termination of any criminal proceedings. 497 F.2d at 823. Such postponement is also the recommendation of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.11 (1973.)[43] Postponement is in fact the course chosen by the San Quentin officials. Since they implemented their new disciplinary Plan in 1972, disciplinary proceedings have been postponed when the case is referred to the district attorney for prosecution (R186-87, 228, 298). The officials urge in this Court, however, that postponement of such proceedings is unacceptable (Brief for Petitioners, p. 17, n.5; p. 29, n.15). To the extent petitioners argue that no special precautions at all are required, they are mistaken, as we have shown above. Further, petitioners have offered no evidence—based on their three years of experience in postponing disciplinary hearings—to show that postponement has in fact interfered with any correctional interest.

There is thus no persuasive reason for not postponing proceedings in many if not most of the cases that are

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[43]Postponement may also be appropriate in analogous situations. Thus, the California Supreme Court recently said that when a probationer faces revocation of probation because of alleged commission of a new crime, "the most desirable method of handling the problems" of concurrent proceedings would be to postpone the revocation proceedings until completion of the criminal case. *People v. Coleman*, 13 C. 3d 867, 895, 533 P.2d 1024 (1975). This is also the position of the American Bar Association *Standards Relating to Probation*, 5.3. The reasoning of both the court and the ABA is that requiring the probationer to defend himself at the revocation hearing, prior to criminal trial, is inconsistent with protection of the Fifth Amendment privilege. The reasoning has equal application here.

referred for possible criminal prosecution. There will undoubtedly be cases in which the officials believe that the accused prisoner must be immediately segregated in order to maintain prison security.[44] There is no reason to believe, however, that *every* accusation of criminal misconduct will be deemed to require segregation. Thus, postponement is a viable option in all the criminal cases in which segregation is not needed as a control device. In many cases it is likely that prison officials will be satisfied either to rely only on criminal sanctions, so long as no present threat to security is posed, or to await the outcome of criminal referral (usually a district attorney's decision not to prosecute) before invoking intramural disciplinary sanctions.

In those cases in which the officials insist on segregation upon the criminal accusation, however, postponement is not a viable option, since the serious consequence of segregation cannot under *Wolff* be imposed without a hearing affording due process protections.[45] Because of the referral for criminal prosecution, such hearings require special precautions to protect the accused's privilege against self-incrimination and his right to defend himself against the disciplinary charge.

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[44]If the period of segregation is relatively short—a few days—there does not seem to be any constitutional obstacle to such segregation without a prior hearing. Both of the courts below specifically stated that this could be done in an emergency (497 F.2d at 817, n.15; A178).

[45]San Quentin's refusal to recognize this led to further proceedings in the district court. See note 24, *supra*. While postponing "disciplinary" hearings, the officials imposed long-term segregation by "classification," without any due process protections at all. This left the accused prisoner worse off than ever, for he was subjected to an extraordinarily serious disciplinary punishment without any fact-finding hearing at all.

It is not sufficient simply to rely on the *Miranda* exclusionary rule. While the failure to give *Miranda* warnings may result in exclusion of the prisoner's statements at a later criminal trial, and while even the giving of *Miranda* warnings–as California did and does–may not lead to a finding that "waiver" of the self-incrimination privilege was valid, these points are not settled and would be a fertile field for litigation. Further, the prisoner would not be protected against the risk of unintentionally incriminating himself by "volunteering" statements in his own defense, as "volunteered" statements are outside the scope of *Miranda's* protection. 384 U.S. at 478. Some prisoners would also, with or without *Miranda* warnings, recognize the possibility of self-incrimination, and would refuse to make any statements at the disciplinary hearing; but they would then be left with no other means of defending themselves.[46] The basic problem is the threat of immediate and serious punishment if the prisoner remains silent, and no exclusionary rule can deal with this problem. While *Miranda* may be "only a rule of evidence," as petitioners contend, the *Lefkowitz v. Turley* line of cases (see note 38, *supra*) establishes

[46]This is what the prisoner did in *Haines v. Kerner*, 404 U.S. 519 (1972). Rather than explain his version of the events at the disciplinary hearing, the prisoner remained silent when accused of assault and was sentenced to solitary confinement. This Court ruled that he was entitled to a hearing on his claim of unduly harsh punishment.

This is also what plaintiff Clutchette did in the present case, when he was informed that his retained lawyer could not be present at the hearing (plaintiff's Exhibit 1, introduced in evidence at A94); plaintiff Ferrel did the same (R288).

that no penalties may be imposed for exercising the Fifth Amendment privilege, and that procedures failing to protect the privilege are invalid. *Uniformed Sanitationmen v. Commissioner, supra,* illustrates the point. There, *Miranda*-type warnings were in fact given. 392 U.S. at 283, n.4. The sanitationmen were even represented by counsel. But the Court held that the economic sanctions imposed when they remained silent invalidated the procedure. Thus, regardless of whether there is "custodial interrogation" within the meaning of *Miranda*, or whether the failure to give *Miranda* warnings might trigger the exclusionary rule, the threat of immediate disciplinary punishment for an uncounseled prisoner presents an equally invalid procedure—the prisoner is required to forfeit either his Fifth Amendment privilege or his due process right to speak in his own defense at the disciplinary hearing.[47]

To avoid this forced surrender of one of two constitutional rights, for those cases in which disciplinary proceedings are not postponed, the Court of Appeals gave the prison officials a choice: (1) they can either protect the Fifth Amendment privilege by

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[47]For the same reason, the Court must reject petitioners' contention that the prisoner is subject to no deprivation unless and until his statements are actually offered in evidence at the criminal trial. The deprivation occurs *at the disciplinary hearing*, when the prisoner is forced to surrender one of two basic rights. The Court in *Lefkowitz* did not wait for any criminal proceeding—it affirmed an *injunction* against the unconstitutional procedure. See *Turley v. Lefkowitz*, 342 F.Supp. 544, 549 (W.D.N.Y. 1972). Similarly, the attorney in *Spevack v. Klein, supra,* and the sanitationmen in *Uniformed Sanitationmen, supra,* all resisted the coercive pressure to testify and there was no criminal trial, but the procedures were nonetheless held invalid.

providing counsel for the prisoner at the disciplinary hearing, thus preventing the hearing from being impermissibly coercive; or (2) they can require that the prisoner respond to questioning, but they must provide "use immunity" as a necessary consequence of the compelled disclosures. 497 F.2d at 823-24, n.23.

A. Counsel

Providing representation by counsel is a recognized measure to insure protection of the Fifth Amendment privilege. See *Michigan v. Tucker, supra,* 417 U.S. at 444; *Miranda v. Arizona, supra,* 384 U.S. at 470. With the advice of counsel, the accused prisoner can make an intelligent and knowing decision whether it is in his interest to speak in his own defense at the disciplinary hearing, or whether the risk of self-incrimination is too great. If he elects to remain silent, upon the advice of counsel, he is still not defenseless, for counsel can present his side of the case, urge the committee to find mitigating circumstances, etc. We believe that providing counsel is an appropriate solution to the unconstitutional dilemma forced upon the accused prisoner. We do not believe this solution is foreclosed by *Wolff v. McDonnell,* for the following reasons:

First, as all of the post-*Wolff* lower court decisions have noted, the issue of protecting the privilege against self-incrimination in disciplinary hearings involving criminal misconduct was not presented in *Wolff.* Thus, while the Court declined to hold that there is a general right to counsel in prison disciplinary hearings, it had no occasion to consider the unusual situation presented when the prisoner is accused both of crime and of

disciplinary misconduct. Further, as pointed out above (pp. 5-8, 30-31, *supra*), the consequences of conviction in a disciplinary hearing in California are significantly more serious than such consequences in Nebraska. The most important differentiating feature is the effect of the California indeterminate sentence law, under which prisoners found guilty of serious disciplinary infractions risk significantly longer terms of incarceration. The Adult Authority can extend the term of incarceration because of a criminal disciplinary incident, without the procedural protections of a criminal trial. Of course, the more seriously an individual can be injured by action of the government, the greater his entitlement to fair fact-finding procedures. Indeed, in the context of rescission of a parole date, the California Supreme Court has squarely held that the prisoner is entitled to all of the protections of *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *including* the right to counsel. *Gee v. Brown*, 14 C.3d 571, 536 P.2d 1017 (1975); *In re Prewitt*, 8 C.3d 470, 503 P.2d 1326 (1972). The court pointed out that "The fact that the [disciplinary hearing on parole rescission] takes place in the 'closed, tightly controlled' prison environment [citing *Wolff*] is of no [California] constitutional significance . . ." *Gee v. Brown, supra*, 14 C.3d at 575, n.2.[48] The court in *Gee*

[48]Another factor militating in favor of as careful procedures in disciplinary hearings as in parole revocations is that disciplinary decisions are not made by high-ranking authorities appointed by the governor to perform the sensitive task of making parole decisions in light of all relevant information; rather, such decisions are made by prison guards whose qualifications are unknown and who have no special distinction making them the safe repository of sweeping powers.

explicitly based its decision on the California Constitution. Accordingly, regardless of the outcome of the present case, California officials must conduct full *Morrissey-Gagnon* proceedings inside the prison walls in cases in which the prisoner faces potential parole rescission. There is no indication that providing counsel in these cases will unduly burden disciplinary committees at San Quentin. After all, the record shows that the disciplinary committee hears an average of only seven cases a week (A30). The record does not show how many of these involve concurrent criminal charges or how many could not be postponed pending the outcome of criminal proceedings. Providing counsel for the small number of cases involving criminal misconduct that could not be postponed would not, on this record, seriously burden San Quentin officials.

Second, as the Court of Appeals noted in this case, "The need for assistance to permit adequate presentation of a defense is particularly strong in the context of prison disciplinary proceedings," 497 F.2d at 821, because "penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery*, 393 U.S. 483, 487 (1969). The traditional reasons for requiring counsel[49] apply with particular

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[49]"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S.45, 68-69 (1932). Because this Court has deemed the right to counsel so important to "the very integrity of the fact-finding process," the decisions establishing that right in the criminal context have been applied retroactively. See, e.g. *McConnell v. Rhay*, 393 U.S.2,3 (1968).

force in cases in which an uncounseled prisoner is forced to surrender one of two basic constitutional rights. In this context, "counsel substitute" will not do.[50] As the Court said in *Maness v. Meyers*, 419 U.S. 449, 466 (1975), "The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege." Accordingly, there is a compelling need for legal advice in electing whether to waive the privilege or to invoke it and risk the disciplinary consequences.

Third, it should not be assumed that permitting the assistance of counsel will unduly prolong or complicate disciplinary proceedings. This Court has recognized in several contexts that counsel can enhance the fairness of proceedings without necessarily playing an inappropriate or unduly adversarial role. See, e.g. *United States v. Ash*, 413 U.S. 300, 312-13 (1973);[51] *United States*

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[50]As pointed out above (p. 42, n.42, *supra*), in all of the cases in the *Lefkowitz* line of cases, and in all of the cases relied upon by petitioners, the accused had the benefit of the advice of counsel. But an authoritative study of California's response to the order of the district court in this case concluded that the San Quentin disciplinary Plan's provisions on representation at disciplinary hearings were "grossly deficient." Vanderet, *Procedural Due Process in California Prisons*, California State Bar Journal, 668, 742 (Nov.-Dec. 1973).

[51]In *Ash* the Court declined to mandate a right to counsel at a photographic "show-up," principally because the accused was not present at the display and counsel could not therefore be of any significant assistance to him. In discussing *Wade*, the Court pointed out that a line-up, in contrast, "offered opportunities for

v. Wade, 383 U.S. 218 (1967); Cf. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970). In *Landman v. Royster*, 333 F.Supp. 621, 654 (E.D.Va. 1971), the court ordered that prisoners be permitted representation by retained counsel at disciplinary hearings, rejecting as ill-founded speculation the prison's objection "that the presence of counsel might turn the hearing into a 'hassle,'" and observing that its own experience with *pro se* trial litigants indicated that the contrary was more likely true. Accord, *Pearson v. Townsend*, 362 F.Supp. 207 (D.S.C. 1973); *Inmate 24394 v. Schoen*, 363 F.Supp. 683 (D.Minn. 1973); *Campbell v. Rodgers*, 1 Prison Law Rptr.99 (D.D.C. 1972) (consent decree). In *Roberts v. Taylor*, 390 F.Supp. 705 (D.R.I. 1975), a prison decision in point here, the court ordered that the prisoner be permitted to consult with counsel and that counsel could be present during the disciplinary hearing, but only as a "non-participating legal advisor." 390 F.Supp. at 709-710. In short, there are ways of affording prisoners the benefit of the advice of counsel without turning disciplinary proceedings into protracted and unwieldy events.

Fourth, in *Wolff* the trial court deemed itself bound by then existing Eighth Circuit precedent on the due process issue, and therefore received virtually no evidence concerning the need for, or workability of,

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the prosecuting authorities to take advantage of the accused," that counsel would be more sensitive to "suggestive influences" than the accused and that without counsel the accused might later be unable to present his version of the event "without giving up his privilege against compulsory self-incrimination." 413 U.S. at 312-13.

due process safeguards like counsel. See *McDonnell v. Wolff*, 342 F.Supp. 616, 627-28 (D.Neb. 1972). Accordingly, there was no opportunity in *Wolff* to consider empirical evidence on the effect of permitting counsel in disciplinary hearings. Such evidence is now available. A survey conducted by the American Bar Association Commission on Correctional Facilities shows that 14 states permit some form of representation by counsel in disciplinary hearings. *Survey of Prison Disciplinary Practices and Procedures*, 22 (1974). Two states, Kansas and Delaware, provide for the appointment of counsel when the disciplinary charge can also be prosecuted as a crime. *Id.* We do not believe that the Court should conclude that providing counsel in disciplinary proceedings involving crimes is, as a matter of law, inappropriate to the nature of the proceedings without any evidentiary basis for this conclusion. The Court of Appeals in this case stated that on remand the district court should consider, *inter alia*, "the availability of members of the Bar through publicly funded and voluntary programs in the vicinity of San Quentin." 497 F.2d at 822. If lawyers are in fact available to serve in the few disciplinary hearings involving criminal charges, and if the evidence of the experience of prison systems permitting counsel shows that no correctional interest would be seriously infringed, surely prisoners should not be denied the protections that counsel can provide.

Fifth, although many prison officials and guards oppose providing counsel in any disciplinary hearings, as they have always opposed the introduction of any outsiders into the prison environment, the nation's experts in the correctional field have now determined

that providing counsel in serious disciplinary proceedings is quite appropriate. Thus, the National Advisory Commission on Criminal Justice Standards and Goals, composed of leading experts in the field, authorizes the use of retained or volunteer counsel, stating that the prisoner may "select someone, including legal counsel, to assist him at the hearing." *Corrections,* Standard 2.12 (1973). Similarly, the *Model Rules and Regulations on Prisoners' Rights and Responsibilities,* Rule V-8(a) (West Pub'g Co. 1973), provide that in cases of "major offenses, the accused may be represented by an attorney." Finally, as early as 1967, the President's Commission on Law Enforcement and Administration of Justice recommended that in prison disciplinary proceedings that may lead to a substantial loss of good time and a resultant increase in the actual length of imprisonment, the prisoner should be provided "the right to representation by counsel." Task Force Report: *Corrections,* 86 (1967). At the very least, the district court on remand should be directed to take testimony from experts in the field to establish an evidentiary record as to the appropriateness of providing counsel in serious disciplinary hearings.

B. Use Immunity

The Ninth Circuit's alternative suggestion that "use immunity" be provided has been the holding of most of the courts to consider the issue. See *Palmigiano v. Baxter,* 510 F.2d 534 (1st Cir. 1974); *Shimabuku v. Britton,* 503 F.2d 38, 44-45 (10th Cir. 1974); *Jones v. Manson,* 393 F.Supp. 1016, 1024 (D. Conn. 1975); *Roberts v. Taylor,* 390 F.Supp. 705 (D.R.I. 1975);

Sands v. Wainwright, 357 F.Supp. 1062, 1093 (M.D.Fla. 1973), *rev'd on procedural grounds*, 491 F.2d 417 (5th Cir. 1973); *Carter v. McGinnis*, 351 F.Supp. 787 (W.D.N.Y. 1973); *Fowler v. Vincent*, 366 F.Supp. 1224, 1227-28 (S.D.N.Y. 1973); *Avant v. Clifford*, 67 N.J. 496,341 A.2d 629, 653-56 (1975); cf. *Melson v. Sard*, 402 F.2d 653,655 (D.C. Cir. 1968) (parole revocation hearing); *People v. Coleman*, 13 C.3d 867, 533 P.2d 1024 (1975) (probation revocation hearing). As the Supreme Court of New Jersey recently said in *Avant v. Clifford, supra*, "To be free to speak in defense or extenuation, a way must be found to immunize whatever the prisoner says or whatever evidence may be derived from what he says from use against him in a subsequent criminal proceeding for the establishment of guilt of the offense involved." 341 A.2d at 653. This Court has required use immunity in analogous situations. See, e.g. *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1974); *Kastigar v. United States*, 406 U.S. 441 (1972); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); cf. *Simmons v. United States*, 390 U.S. 377, 390 (1968) (testimony on motion to suppress inadmissible at trial); accord, *Brown v. United States*, 411 U.S. 223, 228 (1973). As Mr. Justice White explained in *Maness v. Meyers*, 419 U.S. 449, 474 (1975), a "constitutionally imposed use immunity" is called for in these kinds of coercive situations.[52]

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[52]The provision of use immunity in these situations reflects that "This Court has been zealous to safeguard the values which underlie the [Fifth Amendment] privilege." *Kastigar v. United States, supra*, 406 U.S. at 445, citing *Miranda v. Arizona*.

Use immunity would protect the accused prisoner against the use of statements made in his own defense (or the fruits thereof) at a later criminal prosecution, thus making it possible for him freely to defend himself. He would no longer be forced to surrender either the right to be heard or his privilege against self-incrimination. Moreover, from the State's point of view, no correctional interest would be impaired by providing use immunity. Disciplinary hearings could be promptly held and expeditiously conducted, and the disciplinary committee could openly interrogate the prisoner to elicit *all* the relevant facts and circumstances.

Petitioners' objection to use immunity (Brief for Petitioners, p. 17, n. 5) is completely without merit. Petitioners state simply that the prison administrators have "no authority" to grant any immunity. But they do not need any statute or express authority, for "the Fifth Amendment takes care of that without a statute." *Adams v. Maryland*, 347 U.S. 179, 181 (1954). That is, the Constitution itself requires the immunity when testimony is compelled. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); *Uniformed Sanitationmen v. Commissioner*, 426 F.2d 619, 627 (2d. Cir. 1970); *Avant v. Clifford, supra*, 341 A.2d at 655; cf. *Simmons v. United States, supra*, 390 U.S. at 390 (testimony on motion to suppress may not be used at trial); *Maness v. Meyers, supra*, 419 U.S. at 474 ("constitutionally imposed use immunity;" concurring opinion of Mr. Justice White). Indeed, the California Supreme Court has already decided that in California no express authority would be needed in these circumstances. *Byers v. Justice Court*, 71 C.2d 1039,

1050-57, 458 P.2d 465 (1969), *reversed on other grounds sub nom California v. Byers*, 402 U.S. 424 (1971).[53]

If use immunity is provided, the prisoner must of course be so advised at the disciplinary hearing. See e.g. *Uniformed Sanitationmen v. Commissioner, supra*, 426 F.2d at 627; *Jones v. Manson, supra*, 393 F.Supp. at 1024; *Fowler v. Vincent, supra*, 366 F.Supp. at 1228; *Avant v. Clifford, supra*, 341 A.2d at 655-56. We also believe that the accused prisoner is entitled to counsel substitute at the hearing. This is necessary so that the prisoner is not totally uncounseled as to the meaning of use immunity and his right at the disciplinary hearing to defend himself without fear of self-incrimination. Cf. *Maness v. Meyers, supra*, 419 U.S. at 466; compare *United States v. Ash, supra*, 413 U.S. at 312-13. Counsel substitute is also of course needed for all the reasons expressed by the Court in *Wolff v. McDonnell*. Disciplinary charges that can also be prosecuted as crimes usually result in isolation of the accused before the disciplinary hearing (preventing the prisoner from preparing a defense), and of course the issues are likely to be more complex than lesser disciplinary offenses. Thus, "the complexity of the issue makes it unlikely that the inmate will be able to collect and present the

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[53]Petitioners also say that use immunity would not work because there is "no transcription" made of disciplinary hearings. But none is needed. Use immunity would simply bar affirmative use of anything the accused said at the hearing. As to derivative use (i.e. the "fruits" of the accused's statements), a transcript of what the accused said is irrelevant, as is true in all cases of derivative use immunity, for the prosecution simply has to use independently acquired evidence. See *Kastigar v. United States, supra*, 406 U.S. at 460-62.

evidence necessary for an adequate comprehension of the case," and he is entitled at least to lay representation at the hearing. *Wolff v. McDonnell, supra,* 418 U.S. at 570.[54]

In summary, the Court of Appeals was correct in holding that a prisoner accused of criminal misconduct may not be subjected to disciplinary punishment without a hearing affording effective protection of his Fifth Amendment privilege against self-incrimination. In most cases we believe that postponement of the proceedings will be sufficient protection. In cases that cannot be postponed, the State may choose between providing counsel or use immunity and counsel substitute.

II.

THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT ACCUSED PRISONERS HAVE THE RIGHT TO CALL WITNESSES ON THEIR OWN BEHALF, SUBJECT TO REASONABLE RESTRICTIONS

In holding that accused prisoners have a right to present witnesses, the Court of Appeals reasoned that "The fundamental guaranty of due process is the opportunity to be heard. Prior to the imposition of

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[54]The use immunity provided must be broad enough to cover the prisoner's statements to counsel substitute, for there is no attorney-client privilege that would otherwise cover such communications, see *Carter v. McGinnis, supra,* 351 F.Supp. at 793-94, and it would be egregiously unfair to use such confidential communications at a later criminal trial.

disciplinary sanctions, an accused inmate must have an opportunity to show, if he can, that he did not violate the rule as charged or to explain that, although guilty of the charged infraction, there are mitigating circumstances." 497 F.2d at 818. The court said that the ability to produce evidence other than the prisoner's own testimony "is necessary to assure that he will be heard 'in a meaningful manner' ", citing *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The court concluded that without such a right, "relevant exculpatory evidence, not within the personal knowledge of the accused but nonetheless essential to a fair and accurate fact finding determination, may not be heard at all . . ." *Id.*[55]

However, the Court of Appeals did not mandate an unrestricted right to call witnesses, but acknowledged the disciplinary committee's power to limit the number of witnesses. While the only reasons specifically mentioned by the Court of Appeals for limiting witnesses were "to prevent repetitiousness" and to avoid "irrelevant or merely cumulative evidence," the case was remanded to the district court for further proceedings. 497 F.2d at 824. The further proceedings, of course, involve consideration of the new disciplinary Plan submitted by the prison officials. The Plan now

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[55]The need to present witnesses is especially strong in cases in which the prisoner wishes to exercise his privilege to remain silent, for otherwise the committee would hear only the "prosecution" side of the case. Also, "particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970); *Landman v. Royster,* 333 F.Supp. 621, 653 (E.D. Va. 1971).

before the district court—the Plan currently being used at San Quentin—contains several other restrictions on the right to call witnesses (R297), and it has been assumed throughout by all parties that restrictions of the kind mentioned by this Court in *Wolff v. McDonnell* were not objectionable.

In *Wolff*, this Court held that a prisoner has a right to call witnesses "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566. The Court reasoned that "ordinarily, the right to present evidence is basic to a fair hearing", but said that the right is nevertheless not "unrestricted" and "some amount of flexibility and accommodation is required . . . at least on the record made in this case." *Id.*

We believe that petitioners' complaint to this Court about calling witnesses is much ado about nothing. No one has ever contended that there is an absolute right to call witnesses. Certainly any reason for declining to call witnesses that is reasonably related to the concerns expressed by this Court—"unduly hazardous to institutional safety or correctional goals"—must be approved by the district court on remand. The Plan now before the district court provides that, for prisoners who have release dates but face disciplinary charges, "reasons for not calling a witness may include, but are not limited to: danger to the safety of an informant by reason of disclosure of his or her identity, lack of relevant information or the unavailability of the witness" (R297). Prisoners without a release date may call witnesses unless "the witness is not present in the institution, declines to appear voluntarily, is expected to provide the same information as other witnesses, has

no personal knowledge of the circumstances of the offense, or if granting the request would endanger the security of the institution or be likely to result in retribution which would harm an individual." While we have filed other objections to the Plan in the district court, we have filed no objection to these provisions.[56] This matter is clearly a proper one for consideration by the district court on remand, and need not concern this Court.

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[56]Our only objection to the Plan's provisions on witnesses does not relate to the reasons for not calling witnesses but rather to the Plan's vague and discretionary language concerning the right to call *any* witnesses. Thus, the Plan states only that witnesses with pertinent information "may" be called to the hearing; that questions "may" be asked; that inmates with release dates may "invite'. witnesses who will "normally" be called, but inmates without release dates "may" only "request" the calling of favorable witnesses. Our objection is that these provisions do not unambigously provide for a right to call witnesses (subject, of course, to proper exceptions in accordance with *Wolff*) and that "hearings" could be conducted without any witnesses at all for or against the prisoner. This is what in fact happened in a recent disciplinary hearing involving plaintiff Ferrel (see R327,330). Ferrel was denied the right to call, as favorable witnesses, the alleged victim and an officer who, according to the investigating officer, would have exonerated Ferrel. There was no indication that calling either witness would have been "unduly hazardous to institutional safety or correctional goals," *Wolff v. McDonnell, supra,* and no reason was given for refusing to call the witnesses.

III.

THE COURT OF APPEALS PROPERLY REQUIRED THAT WHEN PRISON OFFICIALS DETERMINE TO DENY THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION IN AN INDIVIDUAL CASE, THEY MUST STATE THE REASON OR REASONS THEREFOR AND THAT SUCH REASONS MUST REASONABLY RELATE TO THE NEEDS OF PRISON SECURITY.

The Court of Appeals initially held that accused prisoners have a due process right to confront and cross-examine their accusers. 479 F.2d at 818-820. In *Wolff v. McDonnell*, this Court held that confrontation was not at "the present time" constitutionally compelled and was committed to "the sound discretion of the officials of state prisons." 418 U.S. at 567. On rehearing in light of *Wolff*, the Court of Appeals prescribed a "method by which the soundness of the discretion thus accorded could be subjected to scrutiny," requiring that the officials make a record of the reason for the denial of this right and so inform the prisoner. 510 F.2d at 614-16. The court added that the reasons must relate "to the prevention of those ills about which the Supreme Court [in *Wolff*] was concerned—reprisals, unmanageability, disruption, safety of prison personnel . . ." *Id.* at 616.

Petitioners in this Court state that they have "no objections to recording the reasons for refusal" (Brief for Petitioners, p. 34).[57] Petitioners complain, however,

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[57]Most of the due process cases since *Wolff* have prescribed the same requirement of reasons to support denial of confrontation. See *Aikens v. Lash*, 514 F.2d 55,60 (7th Cir. 1975), *petition for cert. pending*, No. 75-35; *Graham v. State*

that the Court of Appeals unduly circumscribed their discretion by authorizing only certain reasons for denying confrontation and cross-examination.

We believe that any legitimate reason for denying these rights falls well within the broad and general reasons given by the Ninth Circuit. Moreover, it is apparent from the context of the Ninth Circuit's statement that the authorized reasons were only illustrative. The court said simply that the reasons used by the prison officials must be "related to the prevention of those ills about which the Supreme Court was concerned." Petitioners' Plan presented to the district court includes several reasons for denying cross-examination (R297). We have not objected to any of such reasons (see R319-321).[58] There is no reason to believe that petitioners' proposed reasons will not be approved. This is clearly a matter of detail that should and will be dealt with by the district court on remand.

Department of Correction, 392 F.Supp. 1262 (W.D.N.C. 1975); *Daigle v. Hall*, 387 F.Supp. 652 (D.Mass. 1975); *Walker v. Hughes*, 386 F.Supp. 32,42 (E.D.Mich. 1974) *Avant v. Clifford*, 67 N.J. 496,341 A.2d 629,649 (1975). A similar method of preventing arbitrariness was required by this Court in cases of denial of counsel in probation revocation hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

The Plan under which petitioners have been operating and which petitioners have submitted to the district court already provides for documenting reasons for not calling witnesses (R297). In these circumstances, and because petitioners have no objection to the reasons requirement, this aspect of the Ninth Circuit's decision must be affirmed.

[58]Our objection to the Plan on this point dealt with the failure of the Plan clearly to authorize cross-examination in *any* case, regardless of whether the *Wolff* concerns were present (See R319-320).

No one has suggested that either the Ninth Circuit or this Court in *Wolff* was laying down a precise and comprehensive code of disciplinary procedure. The district court can approve the details and authorize specific reasons for denial of cross-examination that come within the general concerns mentioned in *Wolff*.

Petitioners also complain that on rehearing the Court of Appeals preserved the right of confrontation for cases in which the prisoner is charged with misconduct that can also be criminally prosecuted. And the United States as *amicus* (Brief at p. 36) points out that the Ninth Circuit appears to have required a presumptive right of confrontation, subject only to limitation in individual cases based on the concerns expressed in *Wolff*. We agree with this interpretation of the Ninth Circuit's decision.[59] We believe that the right of

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[59]This is also, of course, the position of all the post-*Wolff* decisions cited in note 57, *supra*. These cases interpreted *Wolff* to recognize that "at least in some circumstances, prison officials may be found to have abused their discretion if they deny a request for the right of cross-examination for entirely arbitrary reasons." See *Aikens v. Lash, supra*, 514 F.2d at 60.

We disagree with the contention advanced by *amicus* (Brief at p. 37-38) that the giving of reasons for denying confrontation "cannot be accomplished" in individual cases. In most cases there will be no reason to deny confrontation; the complaining officer will simply appear and give his side of the story and there will be no reason to believe that this will result in "reprisals, unmanageability, disruption, [or risk to the] safety of prison personnel." In some cases there will doubtless be specific reasons for denying confrontation. For example: a confidential inmate informant has supplied evidence and confrontation would disclose his identity and risk reprisal by the accused or others; the accused has given indications that he intends to disrupt the hearing, harass the witness or take revenge against any accuser;

confrontation is so important to the reliability of the fact-finding process that it cannot be dispensed with *except* in cases in which the *Wolff* concerns predominate. This is not inconsistent with *Wolff*, for the following reasons:

First, *Wolff* said that prisoners would not generally "at the present time" have the right of confrontation. 418 U.S. at 568. However, this statement was unnecessary to the decision because in Nebraska prisoners were in fact allowed to question the charging party. *Id.* at 553,567, n. 17. Since the Court emphasized that prison practices in this area were "diverse" and in the "experimental" stage, and since the record in *Wolff* showed that limited cross-examination was in fact permitted in Nebraska, the Court's dictum cannot be considered a definitive ruling applicable in all circumstances.

Further, *Wolff* is distinguishable because, as pointed out above (pp. 5-8, 30-31), the consequences of disciplinary proceedings in California are more serious than in Nebraska. California prisoners face not merely solitary confiment or loss of good time credit, but also indefinite confinement to segregation, forfeiture of wages and assessment of fines, referral to the parole

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the accused demands that cumulative and repetitive witnesses, or those with no relevant information, be produced; or the complaining witness is leader of a rival prison gang and confrontation would exacerbate existing tensions. These are reasons reasonably related to the *Wolff* concerns that *can* be articulated in individual cases. There is simply no reason to believe that particularized reasons, where they exist, cannot be stated. Indeed, precisely this procedure is contemplated by the Plan developed by petitioners, put into operation and submitted to the district court (R297).

board for reconsideration or denial of parole and referral for criminal prosecution as a result of disciplinary hearings. Indeed, under California's unique indeterminate sentence law, a prisoner's term of incarceration may be drastically revised and prolonged on the basis of a single disciplinary conviction. See *In re McLain*, 55 C.2d 78, 357 P.2d 1080 (1960).[60] The effect on a prisoner's term of incarceration can in some circumstances be more serious than parole revocation. Under *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), of course, the accused is permitted to confront his accuser at a parole revocation hearing ("unless the hearing officer specifically finds good cause for not allowing confrontation"). Because *Morrissey*, *Wolff* and the other cases teach that the seriousness of the consequences significantly affects the extent to which due process protections must be afforded, greater protections are required for California proceedings than were required in *Wolff*.

Second, the right in question is too important to the integrity of the fact-finding process to be discarded without a showing that it cannot appropriately be used in the prison disciplinary setting. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). As Mr. Chief Justice Burger said in *Davis v. Alaska*, 415 U.S. 308, 316 (1974), "Cross-examination is the principal means by which the believability of a witness and the truth of his

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[60]Compare *Specht v. Patterson*, 386 U.S. 605 (1967) (extension of incarceration by finding of fact under sex offender statute requires full hearing).

testimony are tested." The right has been characterized by this Court as so essential to the "integrity of the fact-finding process" as to require retroactive application in the criminal context. *Berger v. California*, 393 U.S. 314, 315 (1969); cf. *Pointer v. Texas*, 380 U.S. 400 (1965). The right of cross-examination as the principal means of reliably finding the facts has "remained relatively immutable in our jurisprudence." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Of course, the right is not limited to criminal cases but applies whenever governmental action seriously injures an individual and the propriety of the action depends on fact-findings. *Goldberg v. Kelly*, *supra*; *Greene v. McElroy*, *supra*, 360 U.S. at 496. And the right has, of course, been required for other hearings in the correctional system. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation).

Third, a limited right to confrontation can in fact be implemented without undesirable consequences in the prison disciplinary setting. As the Court noted in *Wolff*, prisons in 28 states use some form of cross-examination in disciplinary proceedings. 418 U.S. at 567, n.18. Indeed, it is not without interest that the Rhode Island officials in the companion case at bar, *Baxter v. Palmigiano*, No. 74-1187, have routinely been conducting hearings affording these rights (e.g. Brief for Petitioner, p.4).[61] The American Bar Association

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[61] Evidence that other states permit prisoners to exercise a right is of "substantial probative value" in demonstrating that restriction of the right is not in fact required by correctional interests. Cf. *Brown v. Peyton*, 437 F.2d 1228, 1232 (4th Cir. 1971). The court in *Brown* also emphasized that courts cannot uncritically accept statements by officials (or their lawyers)

Survey of Prison Disciplinary Practices and Procedures (1974), referred to by the Court in *Wolff*, found that 14 of the 15 states expressing an opinion on implementing confrontation and cross-examination indicated that permitting these rights "had no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been 'upgraded' and that some of the inmate feelings of powerlessness and frustration had been relieved." *Survey*, at p.21. The ABA *Survey* pointed out that it was difficult for many of the other states permitting confrontation to evaluate the consequences of implementation because the procedures had only recently been adopted. Now there has been time for these prison systems to acquire considerable experience in implementing confrontation, so there presently exists empirical evidence as to how the right works in practice. We submit that this Court should not rule out confrontation in all circumstances without an evidentiary showing by the officials—who can and do frequently consult their colleagues in other states and

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regarding security dangers, without a factual basis for such statements:

> "While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." 437 F.2d at 1232.

use them as expert witnesses–that implementation of the right seriously interferes with correctional interests. The Court should not rely on the *arguments* of officials (or their lawyers) who have never tried to implement confrontation without there being *evidence* from officials who have.[62] We believe a full evidentiary record should be developed before the district court on remand.

Fourth, an appropriately limited right to confrontation makes practical sense in the prison setting. Face-to-face with the individual who must suffer the consequences if he has exaggerated, lied or omitted modifying details, a prison guard (like any other person) will be more careful about the facts than when he is dictating an impersonal written report.[63] Prison

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[62]Petitioners repeatedly ask the Court to permit them to engage in "experimentation" in this area. But a confrontation requirement does not preclude experiments in altering disciplinary practices. "Experimentation" here is a euphemism for the hide-bound tradition of not allowing prisoners to ask questions concerning their imprisonment. It must be recognized that most of the significant changes from archaic prison practices have come about in recent years either because of direct court orders or the officials' desire to avoid a court order. See generally Note, *Judicial Intervention in Corrections: The California Experience–An Empirical Study*, 20 U.C.L.A. L.Rev. 452 (1973). "Although many [California] officials contended that modern developments in penological thinking are primarily responsible for changes in prison discipline practices, even these officials admitted that judicial interest has sped the development and adoption of such practices." *Id.* at 542.

[63]The instruction contained in the San Quentin Institution Plan directing guards to be "concise" in preparing Form 115 disciplinary charges, while commendable in some respects, can

guards are no less fallible than other men, and it is possible that their perceptions may be faulty or their judgment influenced by personal friction with the accused prisoner. Their written reports are not entitled to an "irrebutable presumption of accuracy" and it is important that they be subjected to "examination, criticism and refutation." Cf. *Kent v. United States,* 383 U.S. 541, 561 (1966).[64] Moreover, with reliance solely on written reports, a disciplinary committee does not have any opportunity to judge the credibility of the complaining witness, whether a guard or a prisoner. But "one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." See *Berger v. California, supra,* 393 U.S. at 315; *Barber v. Page,* 390 U.S. 719, 725 (1968). We therefore submit that, at the very least, the charging party must be required generally to *appear* at the

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encourage a tendency to oversimplify and omit details whose unperceived significance might prove crucial when seen from a more detached point of view.

For example, when plaintiff Ferrel was accused of an assault, he was denied the opportunity to confront two officers (R327), one of whom admitted after filing his report that "it was possible that his report was incorrect," including the "wrong name;" the other admitted that "at no time did he see anyone with a weapon" (R330).

[64]Special precautions are required in cases in which the disciplinary offense may also be prosecuted as a crime. In these cases, if the accused prisoner exercises his right to remain silent, he is disabled from presenting any defense to the disciplinary charge unless he can do so through witnesses. In such a case, the right to appear and be heard is worthless; the right to question witnesses is indispensable.

disciplinary hearing, whether or not actual questioning is permitted. See *Walker v. Hughes*, 386 F.Supp. 32, 42 (E.D.Mich. 1974). And we can conceive of no legitimate objection to questioning *by the disciplinary committee* to clarify and elicit details of an alleged offense. Cf. Friendly, "*Some Kind of Hearing*," 123 U.Pa.L.Rev. 1267, 1286, n.101 (1975).

It is not necessary to accord to prisoners the same right of cross-examination that is given criminal defendants. Simply having the complaining officer appear would produce more reliable information about what actually occurred. For example, a prisoner charged with disobeying an order might be able to show that it had been unclear or misunderstood. Away from the pressure of the situation in which the alleged violation occurred, a fair-minded guard may be expected to acknowledge the possibility of his own occasional error. Under the practice at San Quentin, he was never given this opportunity. While it is true that the disciplinary committee will probably resolve most guard-prisoner credibility issues in favor of the guard, the San Quentin practice avoided credibility issues altogether by conclusively presuming the truth of the cold words in the disciplinary reports.

The nation's leading correctional authorities now recommend that confrontation and cross-examination be permitted in serious disciplinary cases. Thus, the prestigious National Advisory Commission on Criminal Justice Standards and Goals, in its *Corrections* Standard 2.12 (1973), provides that in major disciplinary actions "the offender should be allowed to confront and cross-examine the witnesses against him." Accord, *Model Rules and Regulations on Prisoners' Rights and*

Responsibilities, Rule V-7(a) (West Pub'g Co. 1973).[65] As early as 1967, the President's Commission on Law Enforcement and Administration of Justice also unequivocally recommended that prisoners be afforded these rights in serious cases. Task Force Report, *Corrections,* 86 (Gov't Printing Office, 1967).

Petitioners' contention that permitting confrontation will alter the proper balance between guard and prisoner is not new. The American Bar Association *Survey, supra,* noted that "many correctional officers vociferously resist the notion of inmate questioning guard. They believe this undermines the relationship on which good institutional order must rest. However, *the experience of jurisdictions granting the cross-examination right does not support this belief.*" *Survey* at 21 (emphasis added). Moreover, to the extent that guard-prisoner relationships may be altered at all, this is probably desirable. The notion that a guard's power must be absolute and unquestioned is the hallmark of an outmoded and highly ineffectual prison system.[66] After all, the "track record" of the American prison

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[65]In the Foreward to the *Rules,* the Commissioner of Corrections of Massachusetts emphasizes that the *Rules* are not an idealist's notion of prisoners' rights but are "a long overdue instrument for the development of sound correctional policy." They provide "a viable blueprint from which a sound correctional management system can be constructed," and are "an invaluable tool" for officials striving to build "systems that operate fairly, thoroughly, and effectively."

[66]As Judge Sobeloff remarked, "Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men." *Landman v. Peyton,* 370 F.2d 135,140 (4th Cir. 1966).

system has hardly been an enviable one.[67] If, instead of a record notable only for failure of the system to aid in controlling crime, the prisons had established a record of great effectiveness in curbing recidivism through innovative correctional techniques, officials would have a stronger claim that their internal decision-making process should not be subject to recognized due process rules. But based on a record of general floundering, we do not believe prison administrators can justify an exemption from due process requirements to which all other government bureaucrats are subject.

Fifth, and finally, the San Quentin Plan presently before the district court in fact appears to permit cross-examination by counsel substitute representing a prisoner at disciplinary hearings (R297, Rule DP-4507). The Plan also appears to permit questioning by an inmate with a release date (*Id.*). The California authorities are required to permit cross-examination by prisoners with release dates by the California Supreme Court's decision in *In re Prewitt*, 8 C.3d 470, 503 P.2d

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[67]As Mr. Chief Justice Burger has said, "A visit to most prisons will make one a zealot for prison reform." Burger, *No Man is An Island*, 56 A.B.A.J. 325,328 (1970). After years of experience in the system, the Director of the Federal Bureau of Prisons concedes that "The most perplexing question that faces us today is how do we change offenders? The simple answer is we don't know.... Three major Federal Commissions . . . all agreed that corrections has been the weakest link in the criminal justice system." Carlson, *The Federal Prison System: Forty-Five Years of Change*, Federal Probation, 37, 39-40 (June, 1975). An indication of the failure of traditionally run prisons to correct is the fact, disclosed by the Brief of the United States as *amicus* (p.25, n. 7), that more than 52% of current federal prisoners have at least one prior commitment to a state or federal prison.

1326 (1972); see also *Gee v. Brown*, 14 C.3d 571, 536 P.2d 1017 (1975). In *Prewitt*, the court held that a prisoner who is faced with possible rescission of a parole date is entitled to all the safeguards specified by *Morrissey v. Brewer*, 408 U.S. 471 (1972), *including* the right to cross-examine witnesses.[68] Thus, California authorities must conduct in-prison hearings affording these rights in all disciplinary cases in which the prisoner has received a date but has not yet been released. Accordingly, regardless of the outcome of the present case, petitioners must continue to allow cross-examination in the circumstances required by the California Supreme Court. We submit that unless petitioners can make a showing that denial of confrontation in *other* serious disciplinary hearings is required by strong correctional interests, the Court should not hold that there is no right to confrontation in any circumstances. We believe that the matter should be explored on remand, where the district court can take evidence on the experience of other prison systems and the manner in which an appropriately limited right to confrontation can be implemented without interfering with correctional interests.

In conclusion, the Ninth Circuit's requirement that the officials permit confrontation except in individual

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[68]*Gee v. Brown, supra*, requires all the *Morrissey* rights and adds the right to counsel as specified by *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). As noted previously (p. 49, *supra*), *Gee* holds that under the California Constitution it makes no difference that these rights must be observed in hearings in the "closed, tightly controlled" prison environment of *Wolff*. 14 C.3d at 575, n.2.

cases when they have reasons related to the *Wolff* concerns is sound and should be affirmed. Details of the precise limitations on confrontation should be resolved in the first instance by the district court on remand.

IV.

THE COURT OF APPEALS PROPERLY REQUIRED THE PRISON OFFICIALS TO BASE THEIR DECISIONS IN DISCIPLINARY HEARINGS ON THE EVIDENCE PRESENTED AT THE HEARINGS

The Court of Appeals held that "the disciplinary committee must be required to make its fact finding determinations solely upon the evidence presented at the hearing." 497 F.2d at 820. Further, in accordance with *Wolff v. McDonnell*, the Court of Appeals said that "To insure compliance with this requirement, the committee must state briefly the reasons for its decision and indicate the evidence on which it relied." *Id.* These complementary requirements track precisely this Court's decision on rudimentary due process in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

Petitioners concede that procedural due process requires that the "accused inmate be given an opportunity to respond to any evidence adverse to him which may be considered by the disciplinary committee before reaching its decision" (Brief for Petitioners, pp. 37-38). The concession is well founded because, as this Court said in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959), in a fact finding hearing "the evidence used to prove the Government's case must be disclosed to the

individual so that he has an opportunity to show that it is untrue." See also *Goldberg v. Kelly, supra,* 397 U.S. at 271; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 300-305 (1937); *United States v. Abilene & S. Ry.*, 265 U.S. 274, 289 (1924).

The Court of Appeals specified this obvious protection because the record shows that the San Quentin disciplinary committee would consider evidence outside the record. A prison administrator testified that he might take into account *ex parte* information casually "passed on" by other prisoners (A39,158); guards and officials could also be consulted off the record (A108, 51-52). In these circumstances, it was clearly appropriate to require that the evidence against the accused be presented at the hearing. Petitioners' assertion that written notice and a statement of the evidence relied upon afford sufficient opportunity to reply to any evidence against the accused (Brief for Petitioners, p. 37), is simply untrue. Unless the evidence is disclosed to the accused, there is no way he can attempt to respond to it before the committee makes its decision. Petitioners' further assertion that "the committee should be free to receive and consider information not made available to the accused inmate" is without support as a general proposition. As Mr. Justice Cardozo put it, relying on undisclosed evidence "will never do if hearings . . . are to be more than empty forms." *Ohio Bell Telephone Co. v. Public Utilities Commission, supra,* 301 U.S. at 303.[69]

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[69] The court said in *Landman v. Royster,* 333 F.Supp. 621 (E.D.Va. 1971), in language directly applicable here, that disciplinary decisions must be based on evidence "which the prisoner has the opportunity to refute . . . To permit punishment to be imposed for reasons not presented and aired would invite arbitrariness and nullify the right to notice and hearing . . . The practice of going outside the record in search of bases for punishment must cease." 333 F.Supp. at 653-54.

The Court in *Wolff* did say that "when personal or institutional safety are so implicated," the required statement of the evidence relied on may omit certain items. 418 U.S. at 565. But this is obviously the exception and not the rule. It is one thing to authorize the non-disclosure of informants for their protection, but it is quite another for the triers of fact to consider information casually "passed on" by other prisoners or to consult off the record with guards and other officials. Disciplinary hearings would be a sham if the decisionmakers were authorized routinely to make *ex parte* determinations on evidence kept secret from the accused.

Indeed, petitioners' Plan pending before the district court—the Plan under which they have been operating in recent years—provides that a guilty finding may be made only on the basis of a preponderance of the evidence "*presented at the hearing*" (R296) (emphasis added). See also *In re Prewitt*, 8 C.3d 470, 503 P.2d 1326 (1972) (requiring disclosure of evidence when parole rescission is at stake at the hearing). The officials have presented no evidence that this interferes in any respect with any correctional interest. If on remand petitioners wish to amend their Plan to create a narrow exception for non-disclosure of informants, they are free to do so. But petitioners have not presented any justification for a gross departure from the due process precept that the case against the accused must be disclosed and the fact-finder may not rely on *ex parte* evidence.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed. Under that decision, the case will be remanded to the district court for further proceedings, including consideration of the specifics and actual operation of the disciplinary Plan proposed by petitioners.

Respectfully submitted,

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